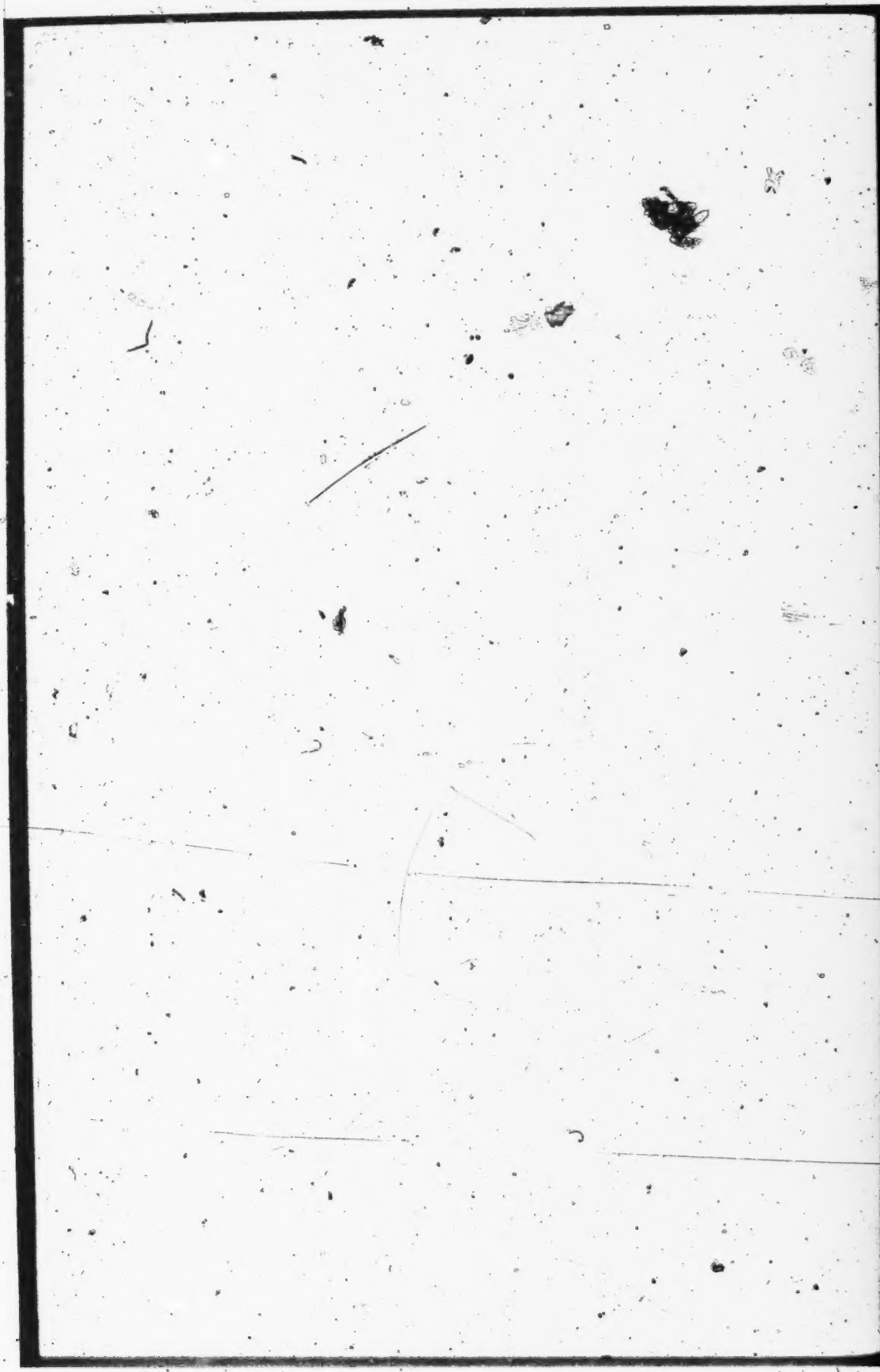

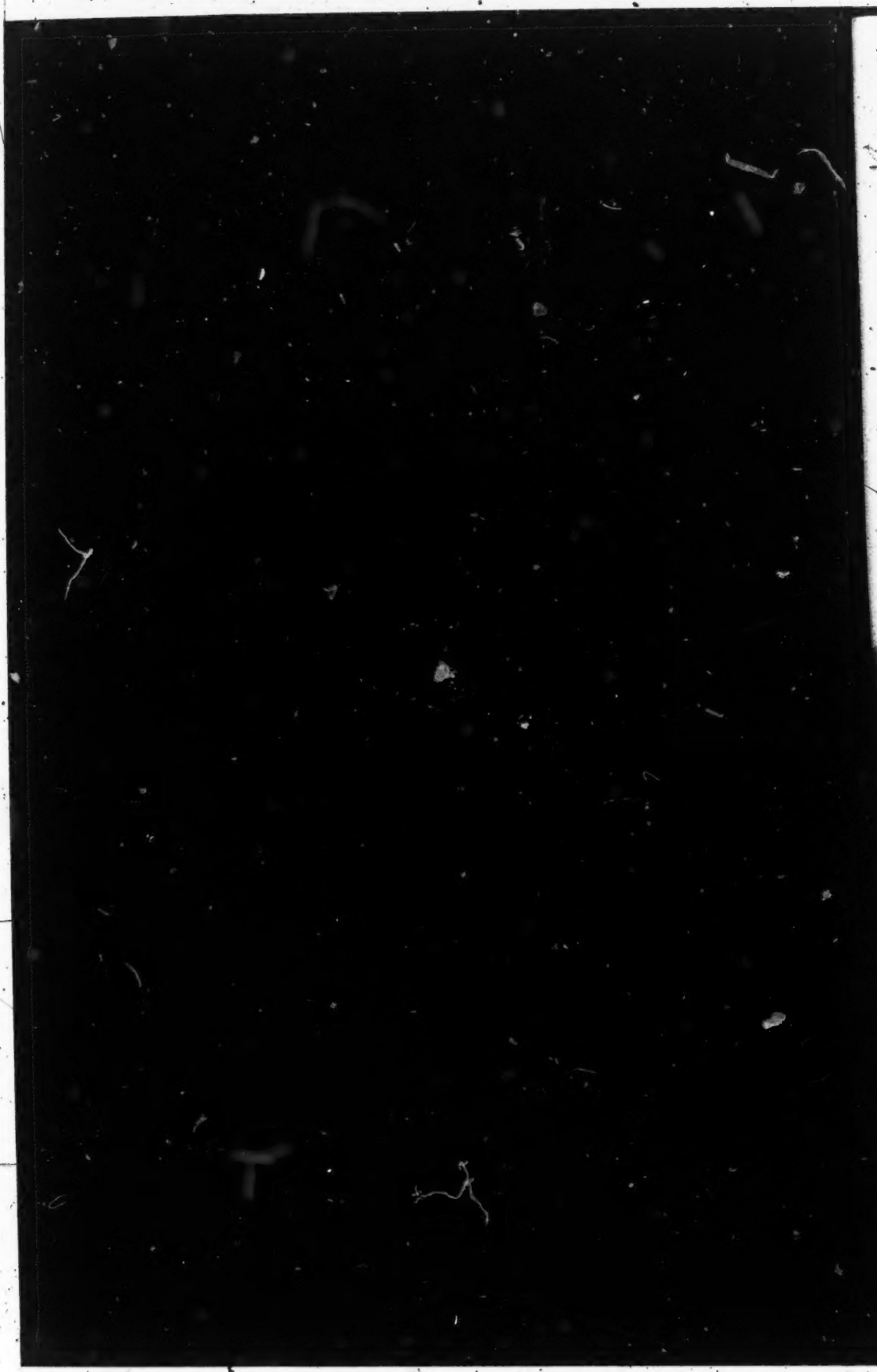

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 22

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

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[fols. a-1] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

PETITION IN ERROR—Filed Dec. 24, 1931

Now comes Johnson Oil Refining Company, a corporation, as Plaintiff in Error, and shows to the court that by virtue of a proceeding instituted before the County Treasurer of Pawnee County, Oklahoma, under Article XIII of the Compiled Laws of 1921, and pending in the County Court of Pawnee County, Oklahoma, upon appeal from the action of said County Treasurer, under the above caption, a judgment was rendered on November 10, 1931, by the said court, ordering and directing an assessment for taxation to be spread on the assessment roll of said Pawnee County of the tank cars belonging to said Johnson Oil Refining Company, numbering 380, and alleged to have been omitted from taxation for the years 1925, 1926 and 1927.

The original case-made of the proceedings and said judgment, and a transcript of the record, is herewith attached, marked "Exhibit A" and made a part of this petition in error.

And the said Johnson Oil Refining Company avers that there is error in the said record and proceedings, and in said judgment, to-wit:

[fol. 2] 1. The judgment of the County Court of Pawnee County is contrary to the evidence.

2. The judgment of the County Court of Pawnee County is contrary to law.

3. The court erred in overruling the demurrer of Johnson Oil Refining Company, interposed to the evidence introduced by the proponent of the assessment for taxation of its tank cars, and in ruling, holding and adjudging upon said demurrer that the burden resting on said proponent was discharged by the evidence introduced by it, and that

the situs of said property was established by such evidence to be in Pawnee County, Oklahoma, and not elsewhere, and to which ruling said Johnson Oil Refining Company excepted.

4. The court erred in refusing to sustain the objection of Johnson Oil Refining Company to the proposed assessment of its cars as a taking of its property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in not holding and deciding that the property assessed was taxable only at the domicile of its owner.

6. The judgment of the County Court of Pawnee County is not supoorted by the evidence, which wholly fails to show that the cars of the Johnson Oil Refining Company, or any of said cars, were located and had an actual situs, in Pawnee County on January 1st, of the years 1925, 1926 and 1927.

7. The conclusion and judgment of the court that the tank cars of the Johnson Oil Refining Company were subject to [fol. 3] taxation in the State of Oklahoma, is contrary to law, in that said cars were, as shown by the evidence, property beyond the territorial jurisdiction of the State, and that such judgment, assessment and taxation constitutes a taking of the property of Johnson Oil Refining Company without due process of law, hence in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The judgment of the Court is contrary to the undisputed evidence, which established that the cars assessed were the property of a non-resident corporation, domiciled in the State of Illinois, used and employed by it in the transportation of merchandise in interstate commerce, and in the course of its marketing business conducted by, and from, its office in the State of Illinois, and were only temporarily in Pawnee County, and in the State of Oklahoma, on such business, and had no abiding place therein.

9. The judgment of the Court is contrary to law because the proof showed that the cars assessed for taxation were only temporarily in the State of Oklahoma, and upon interstate business, there being no statute of the State fix-

ing a situs for such cars, or any portion thereof, in Pawnee County or in said state.

10. The court erred in the construction of the statute of Oklahoma providing for taxation of all real and personal property in the State, and in holding and adjudging that the cars of Johnson Oil Refining Company were property in the State of Oklahoma within the meaning of said stat- [fol. 4] ute, which said construction of the statute would render the same unconstitutional in that it would impute to the Legislature an intent to tax a non-resident's property outside the jurisdiction of the State, and in disobedience to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

11. The judgment of the court is contrary to law, as neither the State of Oklahoma, as such, nor any of its political subdivisions or taxing districts, has the power or authority to tax the cars of Johnson Oil Refining Company, or any of them, and which cars were shown by the evidence to be only temporarily in the State, and for a purpose wholly inconsistent with an indefinite stay therein, to-wit, for receiving an interstate load of refinery products, remaining in said state for such purpose not more than twenty-four hours at a time, and coming into the state approximately only eighteen times, or eighteen days, in the course of one year, and consequently were constantly out of the state for the remaining 347 days of the year, and the imposition of such tax is therefore without authority of law, and amounts to the taking of the property of Johnson Oil Refining Company without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

12. The court erred in overruling the motion of Johnson Oil Refining Company for a new trial, and in refusing to grant it a new trial upon the grounds therein set forth.

[fol. 5] Wherefore Johnson Oil Refining Company prays that said judgment be reversed, and that it be restored to all things it has lost by reason thereof.

Charles Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, Attorneys for Johnson Oil Refining Company.

[fols. 6 & 7] EXHIBIT "A"

IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1741

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

Case-made—Filed Dec. 19, 1931; filed in Supreme Court Dec. 24, 1931

[File endorsements omitted]

[fol. 8] Be it remembered that heretofore certain proceedings were had before the County Treasurer of Pawnee County, Oklahoma, a transcript of which said proceedings is in the words and figures following, to-wit:

[fol. 9] Transcript of Proceedings Before A. H. Bagby, County Treasurer of Pawnee County, Oklahoma, in the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

NOTICE OF PROPOSED ASSESSMENT

Office of the County Treasurer of Pawnee County, Oklahoma

Dated January 25, 1928.

To Johnson Oil Refining Company, Cleveland, Oklahoma:

You are hereby notified that information has been filed by the tax ferret of said county with me as county treasurer of said county, that you were the owner of property which had a taxable situs in said county, of the description, and of the fair cash value, and for the tax years, as is more particularly stated in the notice to me, a copy of which is hereto attached for your information and as part hereof, which property it is declared has been omitted from assessment and taxation in said county.

The law required me to give you this notice by registeres mail, and I have fixed the 3rd day of February, 1928, at the

hour of ten o'clock A. M., as the time and place at or before which you may file written objections in writing to said proposed assessment; at said time and place, or as soon thereafter as may be convenient, said matter will be given due legal consideration.

If no written objections be filed by you at or before said time fixed, it will be assumed that said proposed assess- [fols. 10 & 11] ment is agreeable to you, and said proposed assessment will be made against you in accordance with said notice to me.

Respectfully, A. H. Bagby, as County Treasurer of said County.

P. S.—Any discussion of said matter, before hearing at the time and place above mentioned, with a view to amicable adjustment, should be had with the tax ferret. If and when such adjustments are reported to me, I will give them due consideration. I have no office to perform in this matter except to give it proper and judicial consideration in the proper way. No discussion of the matter with the ferret will excuse your filing written objections, if you do object. All payments on assessments should be made at my office to me or my deputies.

—— ——, County Treasurer.

[fol. 12] Before County Treasurer of Pawnee County, Oklahoma

No. —

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

Objections to Proposed Assessment

The undersigned, Johnson Oil Refining Company, in response to the notice directed to it by the Treasurer of Pawnee County, Oklahoma, objects to the proposed assessment of its property for the years specified in said notice for the following reasons:

I

Because it appears from the matters set forth in said notice that the County Treasurer of said county is without jurisdiction of said proceeding and is without jurisdiction to hear and determine any questions involved therein, or to make said proposed assessment.

II

Because neither the Tax Ferret nor the County Treasurer of Pawnee County discovered that the undersigned had omitted to list for taxation, for the years mentioned in said notice, any of the properties mentioned therein, or that during said years it had failed or omitted to list for taxation any property or assets subject to taxation in Pawnee county.

[fol. 13]

III

Because all of the property of Johnson Oil Refining Company in Pawnee County subject to taxation therein has been taxed for each year it has owned property in said county and that the taxes thereon have been duly paid:

IV

Because Johnson Oil Refining Company is a foreign corporation incorporated under the laws of the state of Illinois and domiciled in that state and is engaged in interstate commerce and that the property so proposed to be assessed by the County Treasurer of Pawnee County, Oklahoma, is used in interstate commerce and is taxable at the domicile of said Johnson Oil Refining Company, or under the laws of the State wherever it may be used or located at the taxpaying period, or according to the laws of the several states in which the same, or any part thereof, may be used.

V

Because, said Johnson Oil Refining Company returned all of its property situate and taxable in Pawnee County for assessment and taxation during each year of its ownership of said property in accordance with the custom, practice and rule adopted and followed by such assessor and other assessors in the state of Oklahoma, and that the same

was accepted and said property was duly assessed and the tax thereon extended on the tax rolls of said county, which tax has been paid.

VI

Because the property proposed to be assessed was not domiciled in the state of Oklahoma and had no taxable [fol. 14] situs in Pawnee County for the years mentioned in said notice.

Wherefore Johnson Oil Refining Company prays that its objections be considered and that such proposed assessment be disallowed and denied, and that the proceedings herein be dismissed.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull, Its Attorneys.

Objections filed, in pursuance to order heretofore made continuing time of filing objections, this 9th day of February, 1928.

A. H. Bagby, County Treasurer.

[fol. 15] Before County Treasurer of Pawnee County, Oklahoma

No. —

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

Order of County Treasurer—Filed Feb. 9, 1928

The above entitled matter came on to be heard by the County Treasurer of Pawnee County on this the 9th day of February, 1928, being the day to which the same was continued, and the Johnson Oil Refining Company having filed its written objections to said proposed assessment, and evidence having been heard,

It is ordered, considered, and adjudged by the County Treasurer that the said Johnson Oil Refining Company was a foreign corporation doing business in Oklahoma on the

1st day of January of the years 1920 to 1927, both inclusive, and that at said times it had property in said Pawnee County which was taxable therein and which was omitted from taxation, and that said property was of the fair cash value of the amounts herein stated and that said property should be assessed to said corporation.

It is therefore ordered that there be spread upon the tax rolls of said county against said Johnson Oil Refining Company an assessment for and as of the 1st day of January, 1920, in the sum of Twelve thousand ($12,000.00) Dollars, and as of the 1st day of January, 1921, the sum of Twelve thousand ($12,000,00) Dollars, and as of the 1st day of [fols. 16-26] January, 1922, in the sum of Twelve thousand ($12,000.00) Dollars, and as of the 1st day of January, 1925, in the sum of Two hundred one thousand, six hundred ($201,600.00) dollars, and as of the 1st day of January, 1926, in the sum of Two hundred one thousand, six hundred ($201,600.00) Dollars, and as of the 1st day of January, 1927, as of the sum of Two hundred fourteen thousand, two hundred ($214,200.00) Dollars, to which order said Johnson Oil Refining Company objected and excepted and gave notice of its intention to appeal to the County Court of Pawnee County.

Dated this 9th day of February, 1928.

(Signed) A. H. Bagby, County Treasurer of Pawnee County, Oklahoma.

[File endorsement omitted.]

[fol. 27] IN COUNTY COURT OF PAWNEE COUNTY

No. 1741

In re Assessment Against JOHNSON OIL REFINING COMPANY, Cleveland, Oklahoma, of Alleged Omitted Property for 1928

ORDER CONTINUING CAUSE—May 23, 1931

And now on this 23 day of May, 1931, hearing on this cause set for May 29, 1931, continued to a future date to be agreed upon.

[fol. 28] IN COUNTY COURT OF PAWNEE COUNTY

Statement of Evidence

Be it further remembered that thereafter, to-wit, on the 9th of November, 1931, said cause coming on for trial in said County Court, at which time there appeared for Pawnee County, C. E. Mitchell, County Attorney of Pawnee County, Ed Waite Clark and Prentice Rowe, special counsel, and for Johnson Oil Refining Company, McCollum & McCollum and West, Gibson, Sherman, Davidson & Hull, and, both parties announcing ready for trial, the following proceedings were had, to-wit:

It was stipulated that, for the purposes of trial, this cause and cause No. 1805 might be heard together and upon the same evidence as they involve the same questions, and that separate judgments should be rendered in each case upon the evidence and which should be considered the evidence in each case.

By the Court: Make your statements.

STATEMENT OF COUNSEL

Mr. Davidson: The position of Johnson Oil Refining Company in its opposition to the proposed assessment, and the facts upon which it is based, can be briefly stated.

The Company, prior to March of this year, was an Illinois corporation, domiciled in that state and with its principal office in Chicago. For many years it has been engaged in the marketing and sale of refinery products. That business is interstate in its character, in that it sells and transports such products to consignees in many different states. Its tank cars have always been employed in that business, and were so employed long before it owned a refinery. The refinery at Cleveland was purchased late in 1922 to supply [fol. 29] merchandise for its marketing business, and since that time its cars have been in constant use in the business, substantially all of them being used in transporting the products of the refinery to points outside of Oklahoma, although not exclusively so, as the cars are also used to transport refinery products purchased from other refineries. But these cars are not necessary to the operation of the plant; they are not a part of the plant, nor a plant

facility. If a facility at all, they are a facility of the company's marketing business.

The cars are loaded at the refinery upon the company's private tracks, and which operation takes about twenty-four hours. When unloaded at the destination in some other state they are dead-headed back to the refinery at Cleveland for another load, unless diverted to some other destination. The interstate trip takes about twenty days on an average, so that no individual car is in Oklahoma, or in Pawnee County longer than about eighteen days in al-, out of any year.

The company pays taxes on its refinery and its equipment in Pawnee County, where it is located. It also pays taxes on these cars and other property in Illinois, under the capital stock tax of that state, receiving credit for taxes paid elsewhere.

We are not objecting to an assessment of the cars merely because they are used in interstate commerce, for we do not contend that that necessarily exempts them from taxation, but upon the ground that the cars are not property within the state of Oklahoma; that they have no taxable situs in the state, either in fact, or by virtue of any legislative enactment, and that to tax them as proposed, or any number of them, would be to deprive Johnson Oil Refining Company of its property without compensation, and amount to a taking [fol. 30] of its property without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

Stipulation as to Certain Facts

It is stipulated by the Johnson Oil Refining Company, and the State of Oklahoma, that the tank cars listed in the tax ferret's notice to the treasurer in the above styled causes were not specifically listed for assessment and taxation on an ad valorem basis in Pawnee County, Oklahoma, for the years as set out in said notices, 1920 to 1928 inclusive.

It is further stipulated that the Johnson Oil Refining Company's refinery and its equipment was assessed and taxed for the years 1923, to 1928, inclusive, as set out in the list and that tank cars were not included in the list.

It is further stipulated that the refinery referred to is situated in Pawnee County, Oklahoma, and it is further

stipulated that Johnson Oil Refining Company was during all the years mentioned a foreign corporation and had its domicile in Illinois.

And thereupon the following testimony was introduced on behalf of the State of Oklahoma:

The Court: Call your first witness:

G. C. LILLY, called as a witness on behalf of the State, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by Ed Waite Clark and testified as follows:

[fol. 31] Direct examination.

By Mr. Clark:

Q. State your name.
A. G. C. Lilly.
Q. Where do you live?
A. 200 Wood Court, Wilmette, Illinois.
Q. That is a suburb of Chicago, Illinois?
A. Yes, sir.
Q. What is your business, Mr. Lilly?
A. I am employed by the Johnson Oil Refining Company, Secretary and Treasurer.
Q. Where does the refinery company have its office, general office?
A. 173 West Adams Street, Chicago, Illinois.
Q. Are you employed in that office?
A. Accounting department.
Q. Is that a foreign corporation?
A. Yes, sir.
Q. Licensed to do business in Oklahoma?
A. Yes, sir.
Q. Mr. Lilly, do you know, does the Johnson Oil Refining Company own any tank cars?
A. Yes, sir.
Q. Do you know how many?
A. At the present time, three hundred eighty-six.
Q. Do you know how many the Johnson Oil Refining Company owned on the first of January, nineteen hundred twenty-eight?

[fol. 32] A. I can't give you the exact number without referring to records, but the number hasn't varied very much in several years.

Q. The number hasn't varied much in several years?

A. No.

Q. Do you have the records with you showing how many tank cars they owned?

A. No, I have not.

Q. When would you say the Johnson Oil Refining Company bought these cars?

A. The first twenty cars we owned were purchased in 1918. We acquired seventy more cars with the purchase of this plant in 1922, and immediately thereafter, bought the remainder of this fleet of cars.

Q. So from that time on, it would be about three hundred eighty cars that the Johnson Oil Refinery owned?

A. About.

Q. Mr. Lilly, for what were these cars used?

A. For the transportation of their refinery products, gasoline, kerosene, from Cleveland, Oklahoma, and elsewhere for marketing purposes, to Iowa, Illinois and Missouri, and other states.

Q. And from where else?

A. From the plant of any manufacturer from whom we bought.

Q. You purchased other products than what you produced?

A. Yes, sir.

Q. You own the refinery at Cleveland?

A. Yes, sir.

Q. And is Cleveland the chief shipping point for that refinery?

A. Yes, sir.

Q. Do you know whether these cars have marked on them: "When empty return to Cleveland, Oklahoma"?

[fol. 33] A. I don't know that they are, at one time I believe they had the name "Cleveland, Oklahoma," stenciled on them.

Q. Now then I have here Railroad Guide, Equipment Guide, for January, 1928. Under the Johnson Oil Refining Company it has this statement: "Send movements and mileage to V. C. Goward, Superintendent Transportation, Cleveland, Oklahoma," and, also the statement: "Send bills for

repairs to cars and make remittances to the Johnson Oil Refining Company, Cleveland, Oklahoma." Do you know whether your company authorized those two statements?

A. I do not.

Q. As a matter of fact, is it true that those are the orders?

A. Except as to the remittances. I don't think we ever authorized anyone to send remittances to Cleveland, Oklahoma.

Q. But you did for mileage, etc.?

A. Yes, sir.

Q. How much trackage does the Johnson Oil Refining Company own in Chicago?

A. None.

Q. Do they own trackage in Cleveland?

A. Yes, sir.

Q. When the Johnson Oil Refining cars are unloaded and empty, is it not a fact that they are returned to Cleveland, Oklahoma?

A. Yes, sir, it is.

Q. All of them, unless there are special orders?

A. Yes, sir.

Q. Do you know, Mr. Lilly, the amount of trackage that the Johnson Oil Company has in Cleveland?

[fol. 34] A. I think we have sixty-seven spots there.

Q. That is room for sixty-seven cars on your trackage there?

A. Yes, sir.

Q. Does your company own any other refinery besides the one located at Cleveland, Oklahoma?

A. No.

Q. Is it a fact that all of the cars owned by the Johnson Refining Company come into Pawnee County sometime during the year?

Mr. Davidson: You mean all or each one?

Mr. Clark: Each one.

A. Yes, sir, I am sure they do.

Mr. Clark: I believe that is all.

Cross-examination.

By Mr. Davidson:

Q. How long do these stay at Cleveland?

A. Average of twenty-four hours per car.

Q. Then where do they go?

A. To whatever destination they are loaded for, in other states principally.

Q. Can you tell, Mr. Lilly, how long it takes on an average, for a car to make a trip, a round trip?

A. I think we have about one and a half car loadings per month. Twenty days per car.

Q. Twenty days to the car?

A. Yes, sir.

Q. You mean that the car is outside of Oklahoma twenty [fol. 35] days out of the month and that it is in Pawnee County about twenty-four hours of the time?

A. Yes.

Mr. Davidson: That is all.—I don't know that I put my question right. It takes a car about twenty days to make a round trip?

A. Yes.

Q. And a car is in Oklahoma then about one and a half times a month?

A. Yes, sir.

Q. That would make it thirty-six hours out of the month that any particular car is in the County?

A. Yes, sir.

Mr. Davidson: That is all.

Redirect examination.

By Mr. Clark:

Q. As I understand it, they load these cars at Cleveland and send them our and when they are empty, they ship them back to Cleveland?

A. Yes, sir.

By Mr. Rowe:

Q. In other words, when a car reaches a point of destination after it is delivered of its products, then it is returned to Cleveland?

A. Yes, sir, unless diverted. If material is purchased from other refineries.

Q. Then it is diverted?

A. No, it would go out with a bill of lading.

[fols. 36–38] Q. Otherwise it would return to Cleveland?

A. Yes, sir.

Mr. Rowe: That is all.

Mr. Clark: That is all.

Mr. Davidson: That is all.

[fol. 39] G. C. LILLY (recalled).

By Mr. Clark:

Q. You are the same Mr. Lilly that testified here awhile ago?

A. Yes, sir.

Q. Mr. Lilly do you know whether the Johnson Oil Refining Company ever paid to the State a tax on these cars prior to the Travis vs. Dickey case in which the cars would not come under the Public Carrier's Statute?

A. I cannot answer, I do not know anything about the Travis vs. Dickey case.

Q. Well, do you know whether the Johnson Oil Refining [fols. 40-42] Company ever paid any taxes in the State of Oklahoma under the Public Carrier's Statute?

A. Yes, sir.

Q. And how long did they pay that tax?

A. I think for four or five years.

Q. And when was the last time they paid that?

A. I am unable to say definitely without having opportunity to examine records, but it was the year prior to the year these cases were started. That was the last time we paid this tax to the State of Oklahoma.

Q. And since then you have not paid the State of Oklahoma any tax?

A. No.

Mr. Clark: That is all.

[fol. 43] G. B. STALLARD

Direct examination.

Mr. Clarke:

Q. State your name.
A. G. B. Stallard.
Q. Where do you reside?
A. Parsons, Kansas.
Q. Are you employed by the M-K-T Railroad Company?
A. Yes.
Q. In what capacity?
A. As chief Per Diem Clerk.
Q. That is in the Car Accounting Department?
A. Yes.
Q. What are your duties, Mr. Stallard, as to keeping the record of the cars?
A. Supervision.
Q. Do you have under your supervision record of the cars of the Johnson Oil Refining Company which are shipped on your railroad?
A. Yes.
Q. For what years?
A. We have now 1925 to date.
Q. That is, 1925 to 1929, inclusive?
A. Yes.
Q. Have you from these records compiled a statement as to the average number of cars belonging to the Johnson Oil Refining Company handled in Pawnee County, Oklahoma, [fol. 44] from 1925 to 1929 inclusive?
A. The statement was compiled under my direct supervision.
Q. Do you know that the statement is correct?
A. Yes.
Q. What was the average number of cars handled in Pawnee County during those years? The purpose of the question is to advise the Court of the average number of cars handled in Pawnee County in the event it should be decided to be the basis of taxation.

Objection.

Mr. Davidson: To which question the Johnson Oil Refining Company objects on the grounds that the question

is incompetent, irrelevant and immaterial, and there is no power in Pawnee County to tax the cars on such basis.

The Court: Overruled.

Mr. Davidson: Exception.

A. During the year 1925 there was an average of 58.6 cars handled in Pawnee County; in 1926, 50.3; in 1927, 54.4; in 1928, 57.6; and in 1929, 66.7 cars.

Q. Mr. Stallard, how did you arrive at those figures as to the average?

A. By taking an inventory on different dates during the month and striking an average of the number of cars.

Q. Do you have under your supervision books which show the location of the various cars on your line on each day of each month?

A. I have.

Q. You arrived at this average through tabulation of the cars of the Johnson Oil Refining Company in Pawnee [fol. 45] County on each of the respective days of the year as shown by those records? Is that correct?

A. Not each day; on certain dates.

Q. What dates did you use?

A. The 1st and 15th of each month.

Q. Then, as I understand it, Mr. Stallard, you arrived at this average by taking the number of Johnson Oil Refining Company cars in Pawnee County on the 1st and 15th of each month during the year?

A. Yes.

Q. Is that the basis of computation customarily used by the Railway Companies in determining the location of their cars?

A. Yes.

Q. And it is considered accurate?

A. Yes.

[fol. 46] Cross-examination.

By Mr. Davidson:

Q. These cars to which you have referred are cars which your records show reached Pawnee County?

A. Yes.

Q. Do you know whether these cars had been delivered to the Johnson Oil Refining Company at the refinery?

A. I did not.

Q. You don't know whether the cars, then, were on the Katy track in possession or control of the Katy or whether they had been delivered across the switch to the private [fols. 47-50] tracks of the Johnson Oil Refining Company?

A. I do not.

Redirect:

Q. Your records show that the cars had been returned to Cleveland, Oklahoma?

A. To Cleveland, yes.

[fol. 51] G. C. LILLY, being recalled, in open court deposes and says:

Direct examination.

By Mr. Clark:

Q. You are the same Mr. Lilly that testified here awhile ago?

A. I am.

Q. Mr. Lilly did you send in a statement purported to be a Return of Personal Property of Johnson Oil Refining Company, Pawnee County, Oklahoma, as of January 1, 1931?

A. Yes, I signed it and sent it in.

Q. And did you list in that assessment some tank cars?

A. Yes, sir.

Q. Are these tank cars a part of the fleet that this case involves?

A. Yes, sir.

Q. What did you list them at?

A. Five Hundred Dollars each.

Q. Now is a part of your work to make out assessments for the Johnson Oil Refining Company?

A. Yes, sir.

Q. Mr. Lilly, during the years that you have testified [fol. 52] that the Johnson Oil Refining Company owned this

fleet of cars, what is the value of these cars, do they depreciate in value?

A. I think they have been depreciating in value ever since we have owned them.

Mr. Clark: That is all.

Cross-examination.

By Mr. Davidson:

Q. Mr. Lilly, on whose advice did you make that return?

A. Mr. C. E. Dacies', Assessor of Pawnee County, Oklahoma.

Q. Isn't it a fact that you had been advised that a compromise and settlement of all these tax ferret cases had been suggested and was agreeable to the County Officers, but had not been consented to by the tax ferret, and that you were advised in order to show your good faith and good faith of the company in suggesting a compromise that you made this return, and that was the sole purpose and object of making the return?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial as to what he was advised and who advised, and not binding on this case.

The Court: You gave that valuation and swore to it, didn't you?

A. Yes, sir.

Q. Was it not your information that a part of that settlement of Five Hundred Dollars was for all these years?

Mr. Clark: We object to that as incompetent, irrelevant [fol. 53] and immaterial.

By Mr. McCollum:

Q. It isn't so much the value but the fact that they are listed at all, brought out by this negotiation.

A. I — that was the value in the return suggested to me by the County Assessor.

By Mr. Davidson:

Q. Do you know the value?

A. No.

Mr. Clark: We offer this in evidence. (To stenographer: "Mark this 'State's Exhibit A' in both cases.")

Mr. McCollum: We want to object to all this testimony relative to the listing of sixty-four cars in the 1931 return, or any other number of cars, and ask that all that testimony be stricken for the reason that it is incompetent, irrelevant and immaterial, and not binding on the company in this proceeding, not making this motion and not asking that the testimony exclusive of these cars be stricken.

The Court: Objection be sustained.

Mr. Clark: Exception.

By Mr. Clark:

Q. Mr. Lilly, handing you that which we have marked "State's Exhibit A", for the purpose of identification, is [fol. 54] that the statement that you made and signed?

A. Yes.

The Court: Any objection?

Mr. McCollum: We object to it as incompetent, irrelevant and immaterial, and particularly object to that part which pertains to the sixty-four cars.

The Court: The objection will be sustained as to the value based on the sixty-four cars.

Mr. Rowe: Object to that.

The Court: Overruled.

Mr. Rowe: Exception.

Mr. Clark: State rests.

(Which said Exhibit "A" so offered and admitted in evidence by the State is hereinafter set out in full at page —.)

(Witness excused.)

DEMURRER TO EVIDENCE

Mr. Davidson: Now, at the close of the evidence for the County, comes the Johnson Oil Refining Company and demurs to the evidence on the grounds that it is wholly insufficient under the law to sustain a judgment of this Court for the assessment and taxation by Pawnee County of these tank cars.

The Court: We will adjourn until nine o'clock in the morning. We cannot finish this argument tonight so we will adjourn until tomorrow morning at nine o'clock.

[fol. 55] And now — this time adjournment is taken until nine o'clock the following day, to-wit: November 10, 1931, at which time all parties being present in court, the following proceedings were had:

Arguments of counsel were heard by the Court at this time.

The Court: The demurrer is overruled.

Mr. Davidson: To which Johnson Oil Refining Company excepts.

And thereupon the State of Oklahoma having rested, the following testimony was introduced on behalf of the Johnson Oil Refining Company:

G. C. LILLY, called as a witness on behalf of the Johnson Oil Refining Company, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by A. A. Davidson and testified as follows:

Direct examination.

By Mr. Davidson:

Q. You are the same Mr. Lilly who was on the stand yesterday?

A. I am.

Q. How long have you been connected with the Johnson Oil Refining Company?

A. I have been continuously with the company since August 16, 1916.

Q. How long have you been an officer in the Company?

A. I have been assistant secretary and treasurer and [fol. 56] Secretary and Treasurer during all that time.

Q. During all the period with which you were connected with it what was the business which you transacted?

A. Principally marketing petroleum products.

Q. The principal business of the company was marketing petroleum products?

A. Yes, sir.

Q. Where was the company's office?

A. Chicago, Illinois.

Q. Has it ever been anywhere else?

A. Until about the fall of 1920, the general office was at Chicago Heights, about 25 miles south of the loop of Chicago.

Q. But since that time, has been in Chicago?

A. Yes, sir.

Q. Up to March 14, this year, the company was an Illinois corporation?

A. That is right.

Q. Since then it has been re-organized as a Delaware corporation?

A. Yes, sir.

Q. But its office is in the same place as before?

A. Yes.

Q. Did the Johnson Oil Refining Company own tank cars for the marketing business prior to the time it bought the refinery at Cleveland, Oklahoma?

A. It did.

Q. Does the company still engage in the marketing business?

A. Yes, sir.

Q. You say that is its principal business?

A. Yes.

Q. When did the company buy the refinery at Cleveland?

[fol. 57] A. August, 1922.

Q. What was that purchased for?

A. Just for the manufacture of dependable, marketable products, for our marketing business.

Q. It is near production?

A. Yes.

Q. So that it furnishes a part of the merchandise that you market?

A. Yes, sir.

Q. Where is the marketing business of the company done?

A. Principally in Indiana, Illinois, Northwestern Ohio, Wisconsin, Missouri, Michigan, Nebraska and Iowa.

Q. You say principally those states, any sold in Oklahoma?

A. Yes.

Q. How much, what proportion, small or how?

A. Very, very small.

Q. Where are these contracts for the sale of refinery products made?

A. All contracts are made in Chicago, Illinois.

Q. And the sales are made in Chicago to consignees in these various states?

A. Yes.

Q. Now you stated yesterday that the cars in question were used for transporting gasoline and other refinery products, both your own as refined at Cleveland, and purchased from other refineries elsewhere. That is correct, is it?

A. That is correct.

Q. And except as to a very small portion, all the products here at Cleveland are carried out and sold in these various states where the company sells its products?

A. Yes.

[fol. 58] Q. From where are the movements of these cars directed?

A. Chicago, Illinois.

Q. That is from your office there?

A. Yes.

Q. I think you stated yesterday, at the time you bought the refinery, you bought some additional cars. Were these cars included in a part of the purchase of the refinery, or a separate purchase?

A. Purchased under a separate contract.

Q. Now, I think you stated yesterday, if not, I will ask you again, what these cars come to Cleveland for?

A. They come to Cleveland to be loaded with the products of this refinery.

Q. And how long does that take on an average?

A. Average of twenty-four hours,

Q. And when they are loaded, what becomes of the car?

A. They are shipped to the destination, to the customers.

Q. Immediately after they are loaded?

A. Yes.

Q. Is that the only purpose of their coming to Cleveland?

A. Yes.

Q. You stated yesterday that you had private tracks on the refinery premises for about sixty-three cars.

A. I think it is sixty-seven cars.

Q. Does the company own any private trackage anywhere else?

A. Yes.

Q. Where?

A. St. Louis, Missouri, Danville, Bloomington, Jacksonville, Springfield, Chicago Heights in Illinois, a trackage in Valpariso, Indiana. There are probably many other [fol. 59] locations that I do not recall right now.

Q. The company's own private trackage?

A. Yes.

Q. Can you state, Mr. Lilly, about how many cars these various tracks provide for, tracks you own in different states, in total?

A. The trackage has never been measured. I have never seen an estimate of it. They vary from a capacity of three to four cars to I should say, ten to twelve cars.

Q. Would these various private tracks you own in different states in your judgment accommodate the whole fleet?

A. Approximately the whole of it.

Q. Approximately the whole of it?

A. Yes.

Q. Are these cars, Mr. Lilly, in any way necessary for the operation of the refinery at Cleveland?

A. No.

Q. I take it that you sould ship refinery products in other cars than your own?

A. We could lease cars.

Q. Many marketers do, do they not?

A. We have done so.

Q. Now, Mr. Lilly, I wish you would tell the Court whether, during the years these cars have been used in the interstate marketing business, whether they have been taxed in any states in which they enter?

Mr. Clark: Object to that as incompetent, irrelevant and immaterial, and I want to tell the Court why. In the first [fol. 60] place, the court indicated that this Travis case indicated that where taxes had been paid at the domicile of the owner they might be entitled to refute a fixed situs at some place else. There is no such situation in this case. What this case says is this:

(Whereupon Mr. Clark reads the case to the Court.)

The Court: Sustained.

Mr. Davidson: Exception.

Q. I will ask you, Mr. Lilly, if these cars have been assessed for taxation outside of franchise license, in the states which they enter in the course of your marketing business?

Mr. Clark: To which the State objects as incompetent, irrelevant and immaterial for the reason that it gave awhile ago. It doesn't make any difference where or when, if they are here, they are taxable here.

The Court: Overruled.

Mr. Clark: Exception.

A. Yes.

Q. Has that been true with reference to the years you have been using these cars for interstate business?

A. Yes.

Q. Has this company paid these taxes from year to year?

A. Yes.

Mr. Clark: Object to that as incompetent, irrelevant and immaterial.

[fol. 61] The Court: Overruled.

Mr. Clark: Exception.

Q. Can you name the states in which these cars are being assessed for taxation as you have stated?

A. Missouri and Nebraska, Iowa. You are referring only to ad valorem tax?

Q. Yes.

A. Wisconsin, Illinois, Ohio, Michigan, Louisiana, Indiana, Georgia, West Virginia, may be others that I can't recall now.

The Court: Oklahoma?

A. Not an ad valorem in Oklahoma, no.

Q. Have you paid any taxes in Oklahoma relative to these cars?

Mr. Clark: Object to that as being improper form.

The Court: Objection sustained.

Mr. Davidson: Exception.

Q. Did you ever pay any taxes in Oklahoma on these cars?

The Court: Objection sustained.

Mr. Davidson: Exception, We offer to prove by the witness that Johnson Oil Refining paid taxes to the State of Oklahoma under the gross earnings Statute upon the demand of the State taxing authorities, to the State of Oklahoma.

Mr. Clark: We object to the introduction of such testimony as to any years other than those for which assess-
[fol. 62] ment is herein sought to be made on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Objections sustained unless you state when. There are some other years, separate them, the year this tax was levied. Objection sustained.

Mr. Davidson: Exception.

Q. I will ask you to state, Mr. Lilly, if it isn't a fact that the State of Oklahoma through the State Tax Commission Collector is still demanding a return of these cars for taxation purposes under the Gross Earnings Statute?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial, improper form and too indefinite for the Court to know whether it is incompetent.

Now, if the Court please, I will state if they still are, if it is for this year it doesn't make any difference.

The Court: Objection be sustained.

Mr. Davidson: Exception.

Q. Is it not a fact, Mr. Lilly, that they are demanding, that the State Tax Commission is demanding from you for each of the years since the companies stopped the payment of taxes under the State Gross Earnings Statute?

Mr. Clark: Object to that as incompetent, irrelevant and
[fol. 63] immaterial.

The Court: Sustained.

Mr. Davidson: Exception.

Q. Now were these taxes that were assessed in the various states and paid to the States, on cars that went into those respective states?

A. No, not on any specific cars, the assessment was on cars that traveled through these states.

Mr. Clark: All questions in regard to taxes being levied is objected to by the State.

The Court: Overruled.
Mr. Clark: Exception.

Q. Do you know how long on an average these cars would remain on your private tracks in these different states?
A. One or two days.
Q. They were there for the purpose of being unloaded?
A. Yes.
Q. Now you say the cars also paid taxes in the States of Illinois?
A. Yes.
Q. What sort of a tax is that?
A. It is known as a capital stock tax.
Q. How does it work?
A. The entire property of the company every year in all states is deducted from the capital stock and surplus accounts and an assessment made on the balance, or difference.
Q. Now does this balance include tank cars that have not [fol. 64] been otherwise assessed?
A. Yes, sir, certainly.
Q. What kind of cars are these cars that the company owns?
A. Just ordinary steel shell tank cars.
Q. Are they insulated cars?
A. No, none of them.
Q. How old are they?
A. They were all second hand cars when we bought them. I don't think any of them have been manufactured since 1920.
Q. Has the company got a branch office at Cleveland?
A. Yes, sir.
Q. What is that office for?
A. For record purposes.
Q. Is any of the company's marketing business done at that office?
A. Yes, a small portion of it.
Q. As far as sales here are concerned?
A. Yes, sir.
Q. In Oklahoma?
A. Yes, sir.
Q. Have they anything to do with interstate marketing business?

A. No.

Q. Have they anything to do with the control of the cars?

A. No.

Q. Where do these cars get their repairs? Their main repairs?

A. Are made either by the railroad company on whose line the car broke down, or at some car shop that is equipped to do the kind of work necessary.

Q. Are there any particular machine or repair shops to which they are sent for repairs?

[fol. 65] A. So far as I know, we have never sent any cars to any but Coffeyville, Kansas, or Tulsa.

Q. Whose shops are they?

A. I do not know.

Q. Does the company maintain a repair shop any place else?

A. Just minor repairs made at Cleveland.

Q. No shop there?

A. No.

Q. You say the company owns no other refinery than that one at Cleveland?

A. That is right.

Q. Have you any plant of any kind at other places?

A. Yes, many of them, market plants, manufacture lubricating oil at Chicago Heights.

Q. Are these cars used for this also?

A. Yes.

Q. Now, your attention was called to a statement in the Railway Guide with reference to forwarding bills for repairs, I believe, to a Mr. Goward. Who is Mr. Goward?

A. Mr. Goward's title is "Superintendent of Transportation". His duties were merely clerical, to keep a record of these cars and to report to the Chicago office.

Q. Who was his superior?

A. The traffic manager.

Q. And where was his office?

A. Chicago, Illinois.

Q. You heard the deposition of the chief clerk of the car accountant's office of the Katy Railroad of Parsons, Kansas, with reference to his statement of the average number [fol. 66] of cars in Pawnee, the daily average number of cars in Pawnee County, did you not?

A. No, I did not hear that deposition.

Q. Well, I will, he testified that he estimated the daily average of cars in Pawnee County during the course of a year, by taking the number of cars on the first and fifteenth of each month and in that way arriving at a daily average of a year, stating that was the customary way among Railroads. Do you know of that system or custom among railroads?

A. I have heard of it.

Q. Do you know, can you state to the Court whether that rule custom or practice is with a view of accounting (to the Interstate Commerce Commission?).

A. I understand that it is not for accounting purposes, but for statistical purposes, for the analysis of the Railway Association.

Q. Have you personally, Mr. Lilly, made a calculation of the daily average of cars in Pawnee County during the years in question, Twenty-five, Twenty-six and Twenty-eight?

A. I made a calculation of such but I had assistance, it was made under my jurisdiction and under my direction.

Q. Now how did you do that?

A. We took the trackage, lists of cars at the refinery for each day in the year from January 1st, 1926, to December 31, 1930.

Q. The total number during the course of the year?

A. Counted the total number of cars for each day for a year.

Q. How did you make an average?

A. Divided the total by three hundred sixty-five.

Q. Can you tell what the average number was in 1925, 1926 and 1928, as a result of that calculation?

[fol. 67] A. I cannot tell you for '25 because the records were destroyed by a flood at the refinery.

Q. What were the other years?

A. 1926, 37 cars; 1927, 37 cars; in 1928, 42 cars; 1929, 55.

Q. In making the purchase of cars from time to time, where are those purchases made?

A. Contracts of purchase were made in Chicago.

Q. In every instance?

A. Yes.

Mr. Davidson: You may take the witness.

Mr. Clark: Comes now the State of Oklahoma and moves the Court to strike from the record all testimony concern-

ing the payment of taxes during the years in question on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Clark: Exception.

Cross-examination.

Br. Mr. Clark:

Q. Mr. Lilly, you say some of the repairs are made at Cleveland?

A. Yes.

Q. They have on hand such material that the repairs would require?

A. Yes.

[fol. 68] Q. Does the Johnson Oil Refining Company make repairs at any other place?

A. No.

Q. And it doesn't carry in stock any repairs except at Cleveland?

A. No.

Q. Now in the matter of average number of cars that you just testified to, that is the average number where?

A. At the refinery at Cleveland.

Q. On the refinery's loading track?

A. Any cars that were on the tracks there, the loading, repair or M. K. & T. switch track.

Q. That includes the ones that were on the M. K. & T. switch tracks?

A. Yes.

Q. How much repair track have you there?

A. I can't say, I don't know the length of the track.

Q. Have you a sixty-three to sixty-seven loading track?

A. The loading track capacity is sixty-seven cars.

Q. And you don't know how much repair trackage?

A. No, I don't, but I judge it would hold twelve to fifteen cars.

Q. What would you judge that on?

A. Just having traveled by and having seen in a hundred times.

Q. You say you have an oil plant up in Illinois, a lubricating oil plant track in Illinois?

A. Yes.

Q. And you use your cars in connection with that?

A. Very infrequent. That is a compounding and barreling plant.

Q. What cars you use there you take off barrels from a gasoline distributing plant and use there?

[fol. 69] A. Yes, sir.

Q. These various trackages you own, for what purpose are they used?

A. For the accommodation of cars to be unloaded.

Q. There are no points to which cars are directed to be returned when empty, are there?

A. No, sir.

Q. As to this corporation tax, or capital stock tax, that you paid in Illinois, if you had paid taxes on an ad valorem basis on this fleet in Pawnee County for the years in controversy here, the State of Illinois would have allowed you to deduct that valuation in paying capital state tax?

A. Yes.

Mr. Clark: That is all.

By Mr. Rowe:

Q. Mr. Lilly, these cars that are going to different destinations and are unloaded, they are returned to Cleveland when empty, are they not?

A. The majority, that is, yes.

Q. You don't leave any of the empty cars in other states on other tracks, do you?

A. No.

Q. They are returned?

A. Yes.

Q. Mr. Davidson asked you with reference to the other trackage being sufficient to house all the cars, that would not be possible would it?

A. No.

Q. You don't have any one place sufficient to accommodate your whole fleet of cars?

[fol. 70] A. No, not any one place.

Q. But you do have more room at Cleveland?

A. Yes. The reason for that is in trying to supply a hundred and sixty-five stations from this state, a hundred and sixty-five places are all different localities.

Q. And they all return to Cleveland?

A. Yes, sir.

Q. On this question of the daily average, do you mean by daily average, that that was the number of cars that was in Cleveland as a daily average?

A. I mean that we took the inventory of cars in the refinery yards of the entire fleet from January 1st, 1930, to December 31, 1930, and added them all up and divided by three hundred sixty-five.

Q. And the other cars that were not there, where would they be, in transit or being unloaded at other places?

A. Yes, sir.

Q. Do you know how many cars the Osage trackage will hold?

A. No, I do not.

Mr. Davidson: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained unless it is their property.

Mr. Rowe: I will withdraw that.

Q. There is no other place or other track that the company has, except Cleveland, where you have empty cars return?

A. No.

Q. Just what was stamped or stenciled on these cars that [fol. 71] were sent to Cleveland, Oklahoma, in 1925 and including 1929?

A. During part of that time I think, all or nearly all, of these cars were stenciled: "Johnson Oil Refining Company, Cleveland, Oklahoma."

Q. The word "home" did not appear?

A. No.

Q. Did it at any time?

A. No, not to my knowledge.

Q. What did appear, as I understand it, is "Johnson Oil Refining Company Cleveland, Oklahoma"?

A. That is right.

Q. Now when these cars were billed out to various points of destination do you know whether or not it was recited in the bill of lading, or other bills? "When empty return to Cleveland, Oklahoma".

A. The billing on each tank car of oil is accompanied by a return billing for the convenience of the customer or station who unloaded that car, merely so that they can make no mistake about the route, about how the car should be returned.

Q. And on all of these cars it was specified: "To be returned to Cleveland, Oklahoma"?

A. Unless it was sent somewhere else, yes.

Q. This question might be competent. Mr. Lilly, in your computation attempting to show the daily average number of cars at Cleveland, did you take into consideration cars that might have been stored, or on the Osage tracks?

A. No.

Q. You didn't consider that in your computation?

[fol. 72] A. No.

Q. Is it not possible, and is it not a fact, that during the years in controversy, a number of cars were on the Osage tracks?

Mr. Davidson: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davidson: Exception.

A. I don't know, probably they were. I never went over there to look at tank cars.

Q. You went over there just as much as you went to Cleveland to count those?

A. No.

Q. It is probably that they were?

A. Yes, probable.

Q. Highly probable?

A. Yes, sir.

Q. And of course, if they were, they were not considered in your computation?

A. No.

Q. And yet they were returned at the Cleveland plant?

A. If they were, they were counted at the Cleveland plant.

Mr. Rowe: That is all.

Redirect examination.

By Mr. Davidson:

Q. The company had made a return each year, hasn't it, since it has owned the refinery for taxation to the assessor of this County?

[fol. 73] A. Yes, sir.

Q. And has paid the taxes so assessed?

A. Yes, sir.

Q. Are these cars a plant facility?

A. We do not consider them so.

Q. Of what are they a facility?

A. Marketing business.

Q. The marketing business?

A. Yes, sir.

Q. Is any part of the investment made in these cars an investment in the refinery itself? In other words, is this a local investment or a general business investment in your marketing business?

A. Well, it is general investment in property for the use of the company, for the use of its business everywhere.

Q. You were asked whether you stored any of the cars on any of the tracks you own, private tracks that you owned in the different states. Have you ever had any occasion for any of the cars to be laid up for storage?

A. No, we have never stored any cars, they are always in use. In fact for several years our fleet has been insufficient. We have leased cars.

Q. I take it that if those cars were idle, the tracks were under your control and could be used for that purpose?

A. They could be used.

Q. You referred to a hundred and sixty-five marketing stations, what do you mean by that?

A. Stations where various petroleum products can be received in tank car loads and stored for sales.

[fol. 74] Q. And in what states are those stored?

A. Illinois, Indiana, Ohio, Wisconsin and Missouri.

Q. Now you were asked about the directions in the bill of lading. You stated those directions were for the information of your customers so that they would know where to send the cars when empty. That is correct is it?

A. Yes, sir.

Q. Did the words "Johnson Oil Refining Company, Cleveland, Oklahoma," stenciled on your cars serve that purpose?

A. No, I don't think so.

Q. Do you know why that was stenciled on the cars?

A. No.

Q. Did the fact that the words "Johnson Oil Refining Company, Cleveland, Oklahoma," were stenciled on the cars

a direction for the return of the car to Cleveland, Oklahoma?

A. No.

Q. So that you put that in the bill of lading?

A. Yes.

Q. So, Mr. Lilly, if these cars ever became idle, hadn't any business to do, that you could take care of practically, approximately the whole fleet in your various tracks in various states?

A. I hesitate to say that we could take care of all of them but the majority of them, the bulk of them.

Q. You have never had occasion to do that anywhere?

A. No.

Q. Neither Cleveland nor any other place?

A. No.

Mr. Davidson: I believe that is all.

[fol. 75] The Court: May be you could answer some questions I would like to know about.

Q. How many cars did you pay ad valorem tax on in West Virginia in 1926, do you know?

A. No, I don't remember. I would have to have my records here before I could answer that question.

Q. And you don't remember how much you paid?

A. No.

Q. Now whatever you did pay in West Virginia in 1926, was that amount deducted from the value Illinois placed on them the same year?

A. Not the amount of tax was deducted, but the value of the assessment was.

Q. Would be just the same?

A. Yes, sir.

Q. Same with all those states you mentioned?

A. Yes.

Q. And you couldn't give me the amount of tax you paid in any of those states in any one year on an ad valorem basis on these cars?

A. Not from memory, but if I had an opportunity to see my records I certainly could do so.

Q. Were those taxes paid in those states all on an ad valorem basis?

A. So far as my experience with the taxation of tank cars, the tax in all other states except in Minnesota and Oklahoma, which is a gross earnings tax.

Q. This might be a legal question. Do you know whether [fol. 76] those states have a special statute upon those cars similar to the statutes of Colorado?

A. I don't know that. I do kno-, however, that if you don't return your cars for assessment in those states, if you don't pay your taxes, they will tie up a car for you if you don't pay them. The Johnson Oil Company has never had any cars tied up for nonpayment of taxes.

A. Did each of those states claim a situs in their jurisdiction for these cars on any amount of them for ad valorem taxes?

A. I don't know that, they claimed a situs there, but the Tax Commissioners of those states demand a return of the cars used in that state for taxes. We have a time or two tried to protest those taxes, principally in Michigan, but never got anywhere with it.

Q. They claimed a return of those cars for taxation?

A. Yes, sir.

Q. And all the cars used in those states were taxed on an ad valorem basis?

A. All except Minnesota and Oklahoma.

Q. All except Minnesota and Oklahoma?

A. Yes.

Recross-examination.

By Mr. Clark:

Q. Mr. Lilly, considerable talk has been made here for ability to store cars in different states. Now, as a matter of fact, the reason you don't store cars there and the reason you don't send them there and do send them down here to Cleveland is because you have more use for them down here?

A. The reason we don't store them there is because we [fols. 77–88] always have use for them.

The reason you send them to Cleveland is because you always have use for your cars, isn't it?

A. It is the one place where we always have use for petroleum cars.

Q. That could be why?

A. Yes, and nothing else.

Redirect examination.

By Mr. Davidson:

Q. If the cars were empty and needed storage it would be less expensive to store them on your own private tracks than to send them down here for storage?

A. Certainly.

Q. You wouldn't think of sending to Cleveland for storage?

A. No, haven't any storage for them.

Q. The only purpose of sending them to Cleveland is for transporting the refinery products?

A. Yes.

Recross-examination.

By Mr. Rowe:

Q. Then why do you have printed on the cars: "Cleveland, Oklahoma"?

A. It doesn't appear on the cars now, "Cleveland, Oklahoma," it was merely an advertising proposition and nothing more.

Mr. Rowe: That is all.

Mr. Davidson: That is all.

The Court: We will take about a five minutes' recess at this time.

[fol. 89] G. A. MINDEMAN, called as a witness on behalf of the Johnson Oil Refining Company, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by A. A. Davidson and testified as follows:

Direct examination.

By Mr. Davidson:

Q. What is your name?

A. G. A. Mindeman.

Q. Are you connected with the Johnson Oil Refining Company?

A. Yes, sir.

Q. In what capacity?

A. Traffic man.

Q. Are you familiar with the trackage at Cleveland, Oklahoma?

A. Yes, sir.

Q. How much trackage have they there?

A. About sixty-seven spots as near as I can check.

Q. In that trackage all on the premises of the company?

A. Yes, sir.

Q. Have you any storage trackage outside of that?

A. Not at Cleveland.

Q. Not at Cleveland?

A. No.

Q. Mr. Mindeman, when a loaded car is delivered to the Railroad company for transportation to its destination, do you know how long it remains in the custody and control of the railroad company?

A. Until it is delivered at the spot of destination.

[fols. 90–99] Q. In returning cars with a bill of lading to Cleveland over the various lines how long does that possession and custody and control of the cars continue?

A. Until it's delivered to the destination at Cleveland.

Q. Do you know at whose risk it is held prior to that time?

A. Carrier's risk.

Q. Katy Railroad?

A. Yes, sir, Katy Railroad.

Mr. Davidson: That is all.

Mr. Clark: That is all. No questions.

Witness excused.

Mr. Davidson: We rest.

The Court: Anything in rebuttal?

Mr. Clark: We rest.

Whereupon the arguments to the court are made at this time.

The Court: Let the record show Judgment for Plaintiff as per J. E.

Mr. Davidson: We want the record to show that Johnson Oil Refining Company excepts to the judgment of the Court in each case.

Which was all the evidence offered or introduced at the trial of said cause.

[fol. 100] IN COUNTY COURT OF PAWNEE COUNTY

No. —

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Illinois Omitted Property for the Year 1928

ORDER FOR JUDGMENT—Nov. 10, 1931

And now on this 10 day of November, 1931, Judgment for Plaintiff as per J. E.

[fol. 101] IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1741

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

MOTION OF JOHNSON OIL REFINING COMPANY TO SET ASIDE THE DECISION OF THE COURT AND TO GRANT IT A NEW TRIAL—Filed Nov. 12, 1931

Comes now Johnson Oil Refining Company and moves the Court to vacate and set aside its decision in the above entitled cause and to grant it a new trial, for the following reasons which materially affect the substantial rights of said Johnson Oil Refining Company:

1. Because the Court was without jurisdiction to hear and determine said cause.

2. Because the Court erred in overruling the demurrer of Johnson Oil Refining Company to the evidence introduced by the County of Pawnee and in holding, ruling and deciding upon said demurrer that such evidence so offered and introduced established a definite situs of the cars of said Johnson Oil Refining Company, and each of them in said Pawnee County.

3. Because the Court erred in refusing to permit Johnson Oil Refining Company to prove that the State of Oklahoma, as such, and through its Tax Commission, was claiming and

asserting the right of the State of Oklahoma to assess said cars for taxation under Section 9981 of the Compiled Okla-
[fol. 102] homa Statutes of 1921, and was demanding that said Johnson Oil Refining Company make return to it of its said tank cars for taxation under said statute for the benefit of the State of Oklahoma.

4. Because the Court erred in finding, concluding and deciding that all the cars of Johnson Oil Refining Company were constructively in the State of Oklahoma and in Pawnee County, Oklahoma, at all times, within the meaning of the statute of Oklahoma providing for the taxation of personal property.

5. Because the decision and judgment of the Court is contrary to the evidence in this respect, to-wit, that the evidence established, without dispute, that the business in which the cars of Johnson Oil Refining Company were used and employed was the marketing, sale and transportation by it, as a non-resident of Oklahoma, of refinery products outside of said State of Oklahoma and that none of said cars were in the said state, or in Pawnee County, except for the purpose of receiving a load of merchandise to be shipped out of the state and for no other purpose, and that said cars remained in said Pawnee County, and in said state, only long enough to receive such load, and that said cars were therefore in transit while within said State of Oklahoma.

6. Because the Court erred in holding, concluding and adjudging that the taxation of all of the cars of Johnson Oil Refining Company, used and employed by it in its marketing business conducted by it at its domicile in the State of Illinois and in the transportation of refinery products outside of the State of Oklahoma, did not amount to a
[fol. 103] deprivation of its property without due process of law and was not in violation of the Fourteenth Amendment to the Constitution of the United States.

7. Because the decision and judgment of the Court is contrary to the evidence in this respect, to-wit, that the evidence establishes, without dispute, that only a small number of the cars of Johnson Oil Refining Company, not to exceed 57, on the average, were in Pawnee County and said State of Oklahoma at any one time during any of said

years, 1925, 1926 and 1927, and that no one car of the entire number owned, used and operated by said Johnson Oil Refining Company was in the State of Oklahoma oftener than eighteen times in the course of any one of the said years 1925, 1926 and 1927, and at such times remained only long enough, not to exceed twenty-four hours at a time, to receive a load of refinery products for interstate shipment out of said State of Oklahoma, and the Court erred in holding, ruling and deciding that an assessment of taxes against all of said cars did not amount, as contended by Johnson Oil Refining Company, to a deprivation of its property without due process of law.

8. Because the Court erred in holding, ruling and deciding that the situs for taxation of the entire number of cars owned, used and employed by Johnson Oil Refining Company was in Pawnee County, Oklahoma at the location of its refinery in Cleveland, in said county, which said refinery supplied merchandise for shipment and sale by said Johnson Oil Refining Company outside the State of Oklahoma, and in the course of its marketing business conducted and managed from its principal office in the state of its domicile, the State of Illinois.

9. Because the Court erred in holding and deciding that [fol. 104] the evidence introduced was legally sufficient to overcome the presumption that the situs of the cars owned, employed and used by Johnson Oil Refining Company in the conduct of its marketing business conducted by it in Illinois and various other states, was at its domicile in the State of Illinois, and in holding and deciding that the evidence introduced established a definite and exclusive situs, for taxation of said cars, in Pawnee County, Oklahoma.

10. Because that Court erred in expressly holding and ruling that the consent of Johnson Oil Refining Company to a credit upon the assessment of its entire number of cars in the State of Illinois for taxes assessed and paid upon said cars in other states was an admission by it that the situs of said cars, for purposes of taxation, was not in the State of Illinois, as the domicile of said Johnson Oil Refining Company.

11. Because the decision and judgment of the Court was contrary to the evidence in this respect, to-wit, that

the evidence establishes, without dispute, that only 48 cars were in Pawnee County on the first day of January in each of said years 1925, 1926 and 1927, and erred in holding and deciding that the tax upon 333 cars, in addition to said number so in Pawnee County on January 1st of each of said years, did not constitute the taking of property of Johnson Oil Refining Company without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

12. Because the Court erred in holding, ruling and deciding that Pawnee County had the right to assess for taxation all of the cars of Johnson Oil Refining Company as a [fol. 105] reciprocal duty for benefits conferred upon the entire number of cars as a unit.

13. Because the Court erred in holding, ruling and deciding that the direction of Johnson Oil Refining Company, in the bills of lading for cars of refinery products to consignee of said shipments in foreign states, to cause said cars, when empty to be returned to Cleveland, Oklahoma, established conclusively the intent of Johnson Oil Refining Company to fix the situs of each of said cars at Cleveland, Oklahoma, notwithstanding the uncontradicted evidence that the purpose of so directing their movements was to receive a load of refinery products for interstate shipment.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys for Johnson Oil Refining Company.

[File endorsement omitted.]

[fol. 106] IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1741

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

JOURNAL ENTRY OF JUDGMENT—Filed Nov. 12, 1931

This cause came on to be heard by the Court, pursuant to assignment for trial by the Court, on the 8th day of

November, 1931, and the trial thereof was concluded on the 10th day of November, 1931.

Upon consideration of the evidence, and the argument of counsel, and the Court being advised in the premises, found and concluded:

That the situs for taxation of the tank cars owned by Johnson Oil Refining Company, and used and employed in its business, was at its refinery, situated in Pawnee County, to-wit: at Cleveland in said county, and that said Pawnee County had the right and authority to assess for taxation the entire number of said tank cars owned, operated and used by said Johnson Oil Refining Company.

That the said tank cars of Johnson Oil Refining Company were omitted from taxation in said County of Pawnee for the years 1925, 1926 and 1927.

That the County Treasurer of said Pawnee County was duly authorized and empowered to assess all of said cars for taxation for the years 1925, 1926 and 1927, as property omitted from taxation for said years, to-wit, 381 cars. [fol. 107] That the fair cash value of said cars for said years 1925, 1926 and 1927, was $570,000.00, or $190,000 for each year.

It was therefore considered, ordered and adjudged by the Court that there be entered and spread on the assessment roll of said Pawnee County an assessment against said Johnson Oil Refining Company, in respect to said tank cars, in the sum of $570,000.00 for the years 1925, 1926 and 1927 being $190,000 for each year—and that a tax be extended on the tax rolls of said county in accordance with said assessment, as provided by law, to which findings, conclusions and judgment of the Court Johnson Oil Refining Company at the time excepted.

And now this 12th day of November, 1931, the motion of said Johnson Oil Refining Company to set aside the decision of the Court and to grant a new trial came on to be heard by the Court, and upon consideration thereof, and being duly advised in the premises:

It is ordered that said motion for new trial be and the same is hereby overruled, and to which ruling and judgment of the Court Johnson Oil Refining Company excepts, and gives notice in open court of its intention to appeal from the judgment of the Court to the Supreme Court of Oklahoma, and requests the Clerk of said Court to note said

notice of appeal on the proper docket, and which is done accordingly.

And for good cause shown, Johnson Oil Refining Company is given and granted an extension of thirty days from this date in which to make and serve upon the opposing party a record and casemade of said judgment and proceedings, the opposing party to have ten days after service thereof to suggest amendments, said casemade to be settled [fols. 108-112] and signed upon five days' notice by either party.

It is further ordered by the Court that the judgment herein be stayed and superseded for sixty days from this date, and pending the perfection of an appeal from said judgment, and to be stayed and superseded thereafter until the final determination of said appeal in the court of last resort.

L. N. Kimrey, County Judge.

O. K.
McCollum & McCollum, A. A. Davidson, for Johnson Oil Refining Company.

O. K. Ed. Waite Clark, for Plaintiff.

[File endorsement omitted.]

[fol. 113] In County Court of Pawnee County

No. 1805

In the Matter of the Assessment Against Johnson Oil Refining Company of Alleged Omitted Property for the Year 1928

Stipulation As to Case-made

The parties hereto, by their respective counsel, hereby stipulate and agree that the above and foregoing is a full, true, correct and complete case-made in the above entitled cause, and contains a full, true, correct and complete copy of the transcript of proceedings had before the County Treasurer of Pawnee County, Oklahoma, and of the notice of appeal and appeal bond, and that the foregoing is also a full, true, correct and complete copy and transcript of all

the proceedings in the County Court of Pawnee County, on appeal, including all the objections made to the proposed assessment of taxes and all the evidence offered or introduced, findings, motions, orders and rulings made, all the exceptions allowed, and the judgment in said cause, and all of the record upon which the judgment and journal entry in said cause was made. The right to suggest amendments to said case-made, and notice of the settlement and signing thereof, are hereby waived, and it is agreed that said case-made may be settled and signed at any time without further notice by either party.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys for Johnson Oil Refining Company. C. E. Mitchell, County Attorney, Pawnee County. Ed Waite Clark, Special Counsel.

[fol. 114] IN COUNTY COURT OF PAWNEE COUNTY

No. 1741.

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Years 1925, 1926, and 1927

NOTICE OF SETTLEMENT OF CASE-MADE

To the attorneys for said plaintiff:

You are hereby notified that on the — day of ——, 1931, at — o'clock — M., or as soon thereafter as counsel can be heard, the case made in said cause, with the amendments, heretofore suggested by you will be presented to the Honorable L. N. Kimrey, at his chambers in the City of Pawnee, Oklahoma, for settlement.

——— ——, Attorneys for Defendants.

Service of the above notice is hereby accepted on this the — day of ——, 1931.

——— ——, Attorneys for Plaintiff.

[fol. 115] IN COUNTY COURT OF PAWNEE COUNTY

No. 1741

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Years 1925, 1926, and 1927

CERTIFICATE OF CASE-MADE

I, the undersigned, Judge of the County Court within and for the County of Pawnee, State of Oklahoma, do hereby certify that the foregoing was presented to me as a case made in the action above entitled; that at the time of the presentation of said case made to me for settlement and signing, there appeared C. E. Mitchell, County Attorney of Pawnee County, and Ed Waite, Clerk, as special counsel on behalf of the State and Pawnee County, and A. A. Davidson and J. A. McCollum, counsel for and on behalf of Johnson Oil Refining Company; and it appearing that corrections in said case made, as served, have been made by mutual agreement of the parties; that no further amendments to said case made as corrected have been suggested by either of the parties; that each of them has waived the right to make such suggestions and has waived notice of the time of settlement, and both parties have, at this time, by their respective counsel, joined in the request that said case made, as so corrected, be settled and signed at this time, and it appearing to me, upon examination thereof, that the same is a true and correct statement and complete transcript of the record and all proceedings in said cause, I do now settle, sign and certify the same as a true and correct case made, and do hereby direct that the court clerk attest [fol. 116] the same with his name and the seal of said court, and file the same in his office as provided by law.

Witness my hand at Pawnee, in Pawnee County, Oklahoma, this 19 day of December, 1931.

L. N. Kimrey, County Judge.

Attest:

Jos. D. Soulsby, Court Clerk. Ethel Traver, Deputy. (Seal.)

[fol. 117] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 118] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

No. 23342

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, Defendant in Error

STIPULATION FOR CONSOLIDATION OF CAUSES—Filed Feb. 11, 1932

It is hereby stipulated and agreed by and between the undersigned, subject to the order of the court, that the foregoing entitled and numbered causes may be consolidated in this court for the purpose of briefing and argument, in as much as each of them involves the same property, to-wit, property of Johnson Oil Refining Company, and presents the question of its taxability, and the right to assess the

same for ad valorem taxation by local assessment and taxing officers within the State of Oklahoma.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys of Record for Johnson Oil Refining Company. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma. C. K. Templeton, by Leander Hall, Asst. County Attorney of Osage County, Oklahoma. John R. Pearson, of Special Counsel for Osage County, Oklahoma, in Cause #23334. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[fol. 119] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

[Titles omitted]

ORDER OF CONSOLIDATION—Feb. 16, 1932

And now on this day it is ordered by the court that the stipulation of all parties to consolidate the four foregoing causes, be, and the same is hereby approved.

[fol. 120] Minute entry of argument and submission, December 13, 1932, omitted in printing.

[fol. 121] IN SUPREME COURT OF OKLAHOMA

23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

JUDGMENT—Dec. 20, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Riley, J.

[fol. 122] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23219

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23342

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Error from the District Court of Pawnee County, State of Oklahoma

Honorable Thurman S. Hurst, Judge

Reversed and Remanded

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Osage County, State of Oklahoma

Honorable Henry Wood, Judge

Reversed

Syllabus

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed Waite Clark, P. E. Rowe, R. K. Robertson, for Pawnee County.

[fol. 123] C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig, for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, for Johnson Oil Refining Company.

[fol. 124] OPINION—Filed Dec. 20, 1932

RILEY, J.:

Cause #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferrett. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in inter-state and intra-state commerce. By the use of them the Johnson Oil Refinery Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other track-[fol. 125] age at Cleveland accommodates 65 cars. The re-

finery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seems to be the result of sales contracts made from the office at Chicago. O. C. Goward is the Superintendent of Transportation for the refinery whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs, they are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no ad valorem tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S., 1921, provides:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation [fol. 126] possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. Travis v. Dicky, 96 Okla. 256, 222 P. 527; State v. Timbrooks Est. 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a

definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Gulf Ref. Co. v. Tillinghast 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. Williamson v. Prairie Cattle Co., 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of the tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage [fol. 127] County, and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J.; Hefner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J.; Andrews, J., absent.

[fol. 128] [File endorsement omitted]

[fol. 129] IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

[fol. 130] PETITION FOR REHEARING—Filed Jan. 14, 1933

Now comes Johnson Oil Refining Company and respectfully petitions the court to grant a rehearing in the above entitled causes, and as grounds therefor the petition says:

I

The court has overlooked the controlling effect of a fundamental principle of taxation, applicable to the facts of record, viz., that the right of a state, or municipality, to tax depends upon, and is measured by its ability to give the protection of its laws to the property taxed, taxation and protection being reciprocal.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194;
Cooley on Taxation, Vol. 1, p. 83;
Webster v. City of Fargo, 82 N. W. 732;
Rolph v. City of Fargo, 76 N. W. 242;
Williams v. Detroit, 2 Mich. 560;
Mobile v. Baldwin, 51 Ala. 61;
Chicago & Northwestern R. R. Co. v. State, 108 N. W. 557;
Cooley's Constitutional Limitations (4th ed.), p. 617.

It is upon this principle that the cars of Johnson Oil Refining Company, engaged in the business of their owner in other states, are taxed there, proportioned to the bene-[fol. 131] fits accorded them while in such states on such business.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18;

Union Refrigerator Transit Co. v. Lynch, 177 U. S. 194;
Gray on "Limitations of the Taxing Power", p. 59;
Keith Ry. Equipment Co. v. Board of Review, 119 N. E. 302.

Upon the foregoing principle:

(a) The admitted use, and the continuous presence, of the major part of the cars, at all times, in other states, and on business which makes such continued use and employment necessary in the free conduct of that business, precludes the possibility of an actual situs for the entire fleet in Pawnee County, or at any one place.

(b) Because of the uncontroverted fact that more than 300 cars of the fleet are continuously absent from the state (not the identical cars, but on an average), engaged in a distinct and separate business from the operation of the refinery, the State of Oklahoma cannot afford the protection of its laws to such cars, the same being subject to the laws of other states in which they are transacting the business of their owner.

[fol. 132] The fleet of cars cannot therefore be taxed as a whole, as was done by the taxing authorities of Pawnee County, on the basis of an actual situs there, because the fleet as a whole was never in Pawnee County or in the state, and therefore such a tax is not only unequal and double taxation, but amounts to a taking of private property without just compensation and to a taking of property without due process of law, and deprives Johnson Oil Refining Company of the equal protection of the law, which constitutional guaranties petitioner has at all times invoked in respect to the taxes assessed against its said property.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341;
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Frick v. Pennsylvania, 268 U. S. 473;
Louisville Ferry Co. v. Kentucky, 188 U. S. 385;
Union Transit Co. v. Kentucky, 199 U. S. 194.

II

The conclusion of the court overlooks the uncontradicted and fundamental fact that the main principal business of

Johnson Oil Refining Company is the marketing of refinery products in interstate commerce, and not, as the opinion indicates, the operation of the refinery at Cleveland, the [fol. 133] refinery being a distinct entity and but one of the sources of the commodities dealt in and sold in interstate commerce, which, though taxable as a separate entity because of its location, is an adjunct to the main business in which the company makes its profits.

In arriving at its conclusion the court has overlooked the evidence that the same cars are used also in the transportation of refinery products from other refineries as well as from the refinery at Cleveland, and that they are used in the transportation of the products of the company's lubricating plant at Chicago Heights, as well as transporting gasoline from its bulk stations located in several states (C-m. 23328, p. 19).

It also overlooks the evidence that the cars are an investment in the marketing business, not in the refinery (C-m. 23342, p. 19).

It has also overlooked the testimony that no cars were allotted to the refinery, but were in fact used generally, and without discrimination, in the company's marketing business (C-m. 23334, p. 58).

It has overlooked the testimony that such control as the Cleveland office has over the cars is for routing purposes only (C-m. 23342, p. 34) and that the Cleveland office is a record office only and has nothing to do with the marketing business nor with the control of tank cars (C-m. 23218, p. 58).

It also has overlooked the fact that taxes were imposed and paid on the cars in seventeen states of the Union, in [fol. 134] all but two of which the tax is upon an ad valorem basis (C-m. 23342, pp. 16, 17; C-m. 23334, pp. 59, 60; C-m. 23334, p. 25).

III

The cars are not an integral part of the refinery, which is a local business, and the functions of which are confined solely to the manufacture of refinery products, wholly independent of the ownership and use of tank cars. The sole function of the cars is transportation, it being immaterial who manufactures or produces the commodity transported. Being owned by a non-resident, they cannot be taxed in Oklahoma, Section 9583, C. O. S. 1921.

IV

The court has overlooked the very serious consequence of its decision that the entire fleet of cars is taxable in and by Pawnee County. The cars are the instrumentalities and means by which a foreign marketing business is carried on in states other than Oklahoma. The same instrumentalities are subject to such tax as the respective states in which they enter to transact the business of their owner may impose, and have in fact imposed, in the exercise of a right recognized by the Supreme Court of the United States. To tax the entire fleet in Oklahoma is to infringe upon the freedom of commerce, being practically a denial of the right of the company to engage in interstate busi- [fol. 135] ness and to import merchandise, by means of these cars, into other states, and, in effect, denies the right of such other states to exercise the same privilege accorded to the State of Oklahoma, if it sees fit to exercise it.

V

The case of Prairie Cattle Co. v. Williamson, 5 Okla. 488, cited in the opinion, is not, we submit, in point. In that case cattle of the Prairie Cattle Company, evidently a non-resident, were found in Beaver County, Oklahoma, into which they had drifted from another range. The number of such cattle in Beaver County, grazing there in the year 1895, was estimated to be six hundred. The decision that the cattle were taxable in Beaver County rested upon a special statute providing that "whenever any live stock shall be located in this territory for the purpose of grazing it shall be deemed to have acquired an actual situs there for the purposes of this act," and which was an act providing for taxation of personal property "located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September." The court held that the legislature had authority to give such cattle a taxable situs. We submit, therefore, that the decision is inapplicable to the record in these cases as an authority on the question of actual situs; as distinguished from a legislative situs.

[fol. 136] We submit, therefore, upon the facts, that the tax assessed is beyond the power of the state to impose, and upon property not within its jurisdiction, is an in-

fringement upon the freedom of commerce, places an undue burden upon interstate commerce and violates the Fourteenth Amendment to the Constitution of the United States.

For the foregoing reasons, and in view of the tax assessments on the property, amounting to over a million dollars and entailing a heavy burden of taxation, and in view of the important questions involved, and the far-reaching effect of the decision, we earnestly request a rehearing and reconsideration of these cases.

Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Attorneys for Johnson Oil Refining Company.

[fol. 137] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

[Titles omitted]

(Consolidated)

ORDER DENYING PETITION FOR REHEARING—Jan. 31, 1933

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby denied.

Swindall, J., dissents.

[fol. 138] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

DISSENTING OPINION ON REHEARING—Filed Jan. 31, 1933

SWINDALL, J., dissenting:

An opinion was rendered in these consolidated causes by this court on the 20th day of December, 1932, with which I cannot agree.

The Johnson Oil Refining Company is a corporation organized under the laws of the State of Illinois engaging in the business of refining and selling petroleum products. To facilitate its business it maintains and operates a fleet of approximately 381 railroad oil tank cars. By the use of them the Johnson Oil Refining Company transports refined products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this state. Sometimes the company purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked "Johnson Oil Refining Company, Cleveland, Oklahoma," and "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma." The empty cars are, unless diverted by special order as aforesaid, returned to Cleveland. [fol. 139] Repair trackage is maintained at Cleveland which accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. Throughout the year the company has an average of approximately 64 cars per day at Cleveland, Pawnee County, Oklahoma, and an average of approximately 50 cars per day at Osage, Osage County, Oklahoma, where incoming and outgoing cars are held by the railroad company when congestion occurs at the refinery and when economical railroading requires. The remainder of the 381 cars are outside the State of Oklahoma in various other states. The cars move in sixteen states. This company maintains an office in Chicago where its officers having ultimate executive control reside. But, no trackage for cars is maintained in Chicago. Cleveland is the one place where the company always has use for these cars. All of the cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products are the result of sales contracts made from the office in Chicago, Illinois. The superintendent of transportation for the refinery lives in Cleveland and that office has control and supervision over the cars. No tax is paid on these cars in Oklahoma. A capital stock tax is paid in Illinois and they are taxed as personal property in several of the states in which they travel.

Upon these facts the opinion delivered in the causes held, first, that none of the cars were taxable in Osage County, Oklahoma, and, second, that the entire fleet of 381 cars were taxable in the State of Oklahoma in Pawnee County on the theory that all of them had their situs at that place in this state. It is from this latter proposition that I dissent. The tax sustained by the opinion is clearly a direct tax upon tangible personal property a large proportion of which is constantly outside the State of Oklahoma, although [fol. 140] the specific items of property making up the whole are regularly in and out of the state. It is my opinion that a tax so laid is a violation of the 14th Amendment to the Constitution of the United States, that the State of Oklahoma is taxing property outside its jurisdiction.

Mobilia sequunter personam was a well established maxim of the common law, and the situs of personal property of every description, wherever it was actually kept or located, was held to be at the domicil of the owner and the property was subject to the jurisdiction of the owner's sovereign. 26 R. C. L. p. 273-4, citing St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 U. S. (L. Ed.) 192, and Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497. It is said that this doctrine grew up when most personal property was of a nature which was kept close to the person of the owner, was small in amount, and was seldom removed from one jurisdiction to another without the removal also of its owner. In recent times, with the growth of modern industry and transportation, an extraordinarily large body of tangible and intangible personal property has arisen which has its location and ownership entirely independent of the domicil of the owner. In response to this situation the doctrine of location for taxation of personal property has changed.

One of the earlier cases noting the weakness in the fiction mobilia sequunter personam and pointing to actual situs as the proper place for taxation was Hoyt v. The Commissioners of Taxes, 24 N. Y. 224. In that case the court said:

"It is said, however, that personal estate by a fiction of law has no situs away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey rests

upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The [fol. 141] necessary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign state.

* * * * * * *

"Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the situs of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule."

The law in this country seems to have developed consonant with the thought contained in that option. The Supreme Court of the United States has definitely and unequivocally established the principle that tangible personal property is taxable at its actual situs. Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, and cases cited post. See also Prairie Cattle Co. v. Williamson, 5 Okl. 488, 49 Pac. 937. It holds to the view that taxation by a state of such property having situs outside its boundaries is a violation of the 14th Amendment to the Constitution of the United States. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150. On the other hand, in the field of intangible property the law in most cases, depending, upon the circumstances, still holds to the doctrine that such property is taxable at the

domicil of the owner. In the Union Refrigerator Transit Co. v. Kentucky case, supra, Mr. Justice Brown, delivering the opinion of the court, said:

[fol. 142] "Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim mobilia sequunter personam, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. (Citations.)

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. * * *"

See 26 R. C. L. p. 282; Notes, 56 Am. Dec. 527, L. R. A. 1915C 914.

The property involved in the case at bar is tangible personalty and would ordinarily fall under the rule which taxes such property at its situs irrespective of the domicil of the owner. However, a prerequisite to the taxation of such property at its situs is that it have a situs, and this property is of a class which in its nature is mobile and may, therefore, move from place to place with such rapidity that it is extremely difficult to assign to it a definite location. While the sovereign has certain jurisdiction over every chattel situated within its territory, not every chattel which happens to be so situated can be regarded as having a taxable situs there. A chattel merely temporarily within the limits is not subject to the ordinary property tax. It [fol. 143] must have become identified with the jurisdiction as a part of its property. See Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091;

Kelley v. Rhoads, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259; Robinson v. Longley, 18 Nev. 71, 1 Pac. 377; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; and the cases regarding vessels cited post.

The Supreme Court of the United States has dealt with the problem of jurisdiction to tax this type of property a number of times and a review of some of the decisions sheds much light upon the solution. We are, of course, bound in the present case by its decisions.

In dealing with property of this sort that court has sanctioned the taxation of the fixed value of such property continuously within the state during the taxing period by any method which fairly arrives at that value, although the individual units thereof are constantly changing and are not, as such, identified with the jurisdiction. In Union Tank Line Co. v. Wright (1919) 249 U. S. 275, 63 L. Ed. 602, the court, in considering the proper measure of value for taxation of railway tank cars used in and out of a non-domiciliary state, said:

"A state may not tax property belonging to a foreign corporation which has never come within its borders; to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value, along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the tangible value due to what we have called the organic relation of the property in the state to the whole system'. How to appraise them fairly when the tangibles constitute a part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is gen- [fol. 144] erally impossible. We have accordingly sustained methods or appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western U. Teleg. Co. vs. Atty. Gen. (1888) 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator

Transit Co. v. Hall (1899) 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599). But if the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment, or both. Western U. Teleg. Co. v. Atty. Gen., 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961; Marye v. Baltimore & O. R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, 35 L. Ed. 613, 617-3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep 305, s. c. 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. Rep. 604; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 Sup. Ct. Rep. 631; Fargo v. Hart, 193 U. S. 490, 48 L. Ed. 761, 24 Sup. Ct. Rep. 498; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 62 L. Ed. 827, 829, 38 Sup. Ct. Rep. 373."

Two of the cases cited above, American Refrigerator Transit Co. v. Hall (1899) and Union Refrigerator Transit Co. v. Lynch (1900), consider specifically the taxation of cars similar to those involved in the present case by a non-domiciliary state. In these cases the facts are essentially the same. In each the owner was engaged in supplying cars to shippers wherever needed; the cars were not confined to any particular route; were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them; had no regular intervals nor any regular number; were engaged solely in interstate commerce; and when in the state were only transiently present. The average number within the state dur- [fol. 145] ing the taxing period in the Lynch case was ten cars per day. That case relied heavily upon the authority of the Hall case in which the court said:

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific

and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & O. R. R. Co., 127 U. S. 123; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

The same question was presented in Germania Refining Co. v. Fuller, 245 U. S. 631, 62 L. Ed. 521 (181 Mich. 618) wherein the cars were oil tank cars and the court affirmed the case by memorandum opinion upon the authority of the two cases supra. See also Prairie Cattle Co. v. Williamson, supra, where the Oklahoma Territorial Court sustained a tax on the average theory.

After the decisions in these two cases the question of the power of the domiciliary state to tax the same character of property was presented in the case of Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 195, 50 L. Ed. 150. In that case the cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and [fol. 146] Mexico. The domiciliary state, Kentucky, taxed the entire fleet of 2,000 cars for the years 1897, 1898, 1899, and 1900. Durig those years the average number of cars used in Kentucky per day was 28, 29, 40, and 67, respectively. The court treated the tax as one upon "tangible personal property permanently located in other states," and held the same invalid on the ground that the domiciliary state had no power to tax such property. The opinion indicated, however, that Kentucky could have taxed the average used within its borders. It said:

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

No intimation was made, or needed, with respect to where the excess cars were taxable.

Following this case within less than a year the court again passed upon the power of the domiciliary state in the case of New York C. & H. R. R. Co. v. Miller (1906), 202 U. S. 584, 50 L. Ed. 1155. There the state of New York taxed all of the rolling stock of a railroad company although a considerable proportion of it was constantly outside the limits of the state. The relator contended that the proportion constantly outside should be deducted from the New York tax. No showing was made that any specific items were used continuously and exclusively outside of the state during the whole tax year; the court specifically assumed that none were. The court referred to the cases limiting the power of the domiciliary state to tax, including Union Refrigerator Transit Co. v. Kentucky, supra, then said:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into [fol. 147] another state for a day, a week, or six months, and then brought back."

Again, in answer to the contention that the present case was but the complement of those cases holding such property taxable in non-domiciliary states, the court said:

"In the present case, however, it does not appear that any specific cars of any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

A consideration of these cases, together with the history of the law on this subject, elucidates some of the principles governing the decisions. When the industrial revolution increased enormously the body of tangible and intangible personal property the maxim mobilia sequuntur personam was already established and the courts followed it until the necessity of taxing personalty at its actual situs became obvious. They then departed from the maxim in favor of the situs, but for the latter to apply the property must have

become identified with a jurisdiction other than that of its owner. There remained a class of property for which no situs could be definitely defined. A strong feeling has constantly obtained that no thing of value should escape taxation altogether. So, in such cases, the courts have retained the domiciliary theory. This, it seems, should alleviate the necessity of a court seeking out the most definite of several elusive possible situses and oblige it to uphold a tax only when the property has a defined situs within the taxing jurisdiction. Complementary action of other states should equalize the burdens. Property difficult of location has frequently been held taxable in two states. While the courts have not exhibited squeamishness at this situation, they have, nevertheless, tried on the whole to develop a harmonious system. With respect to property similar to that involved herein Mr. Justice Lurton in [fol. 148] Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, expressed the feeling of difficulty of taxing at the situs as follows:

"To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property."

Such a principle would lead to conflicts in taxation between states and disrupt the harmony of the taxing system as a whole. Unfortunate individuals engaged in legitimate trade between states would suffer hardship. Under certain circumstances the courts have applied the theory of fixed value with changing identity. The items of property do not have a situs within the state but the fixed value is always present. In fairness to that state it should be taxable. Yet, it would be a violation of the very principle upon which the theory is set if the state were allowed to tax a greater amount than the value existing within its borders or to tax where no fixed value really exists. It seems that the minimum should be where there is sufficient average continuously used within the state so that it may be said that the average value is identified with the jurisdiction and the maximum should include only that value. Random excursions of cars into a state in insufficient quantity or with insufficient continuity to create a

fixed value identified with the jurisdiction should not justify a tax. In harmony with the feeling that all property should be taxed somewhere such property should be taxed at the domicil of the owner. See New York C. & H. R. R. Co. v. Miller, supra.

In the present case I have no doubt that the average value of the property used in this state is taxable herein. On the other hand, it seems clear that under the decisions cited above much of this property was properly taxable in states other than Oklahoma and another part of it probably had no such definite location as to be taxable at its situs at all. If Oklahoma sustains a tax upon all of the property it has violated the interests of harmony in the taxation of such property. The same is true even if we hold that each item of property has an actual situs in this state, [fol. 149] though I do not say that it would not then all be taxable here. But, I do feel that such consideration should make us reluctant to find that situs. Again, with respect to such part as perhaps has no taxable average elsewhere, we should not try to import a situs by any forced conceptions, on the theory that the most definite situs is in this state, but should yield to the domiciliary jurisdiction.

It is my opinion that each unit of the property involved in this case, that is, each tank car, cannot upon analysis be held to have an actual situs in the State of Oklahoma. Each car came into and went out of the state during the taxing period. It stayed at the refinery from 24 hours to 10 days each trip. And there were always a greater number out of the state than in its boundaries, so each car must have remained outside the state considerably longer than it did inside. The fact that the cars were used to transport the products of the refinery at Cleveland, that all other points to which they went were haphazard, that they were returnable when empty to Cleveland, that the company repaired them there and maintained storage tracks for them at that place, and that they were always in demand at Cleveland only, does not seem to me sufficient to establish their situs in toto in Oklahoma. These facts are but evidentiary of the essential factor—that each car is as a whole identified with this jurisdiction. There remains the company's purpose to, and the fact that it did, use these cars widely in interstate commerce, that the cars were in fact employed more out of the state than in it. Purpose coupled with ac-

tion seems to be the controlling principle in assigning a situs to chattels. See Delaware, L. & W. R. Co. v. Pennsylvania, Kelley v. Rhoads, Robinson v. Longley, Brown v. Houston, and Coe v. Errol, all cited supra.

Some of the cases most closely in point in the present situation are the cases decided in the Supreme Court of the United States concerning the situs for taxation of vessels. In the case of Hays v. Pacific Mail S. S. Co. (1855) [fol. 150] 17 How. 596, 15 L. Ed. 254, California laid a tax upon ocean-going vessels. They were owned by a New York corporation and operated by way of Panama to San Francisco, California, and points in the Territory of Oregon. The ships operated on schedule and were in each port long enough to transact their business there. After discharging at San Francisco they proceeded to Benicia, California, where the company maintained a naval dock and a ship-yard for its ships to put in when not otherwise engaged, for repairs, and to await the commencement of the next voyage, usually ten or twelve days. The court held that these ships had no situs for taxation in California.

In Morgam v. Parham (1873) 16 Wall. 471, 21 L. Ed. 303, the vessel operated on a schedule between Mobile, Ala., and New Orleans, La., touching each port about three days per week. The ship was owned by a resident of New York and was registered in that state. The captain resided in Mobile and a superior agent resided in New Orleans. The ship never went into other waters. The court held the ship, together with others in the same situation, had no situs for taxation in Alabama, and said that such situs was in New York.

In 1905, in Old Dominion S. S. Co. v. Virginia, 198 U. S. 298, 49 L. Ed. 1059, the court held that a ship on navigable waters operating wholly within the state of Virginia but engaged in interstate commerce, had a situs for taxation in that state.

In 1906 it decided Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 50 L. Ed. 1082, wherein vessels and barges operated on inland waters. They were owned in Illinois, had "Paducah, Kentucky" painted on their stern, and when not in use were kept in Paducah. The court held that they had no situs for taxation in Kentucky.

When one compares these cases with the facts in the case at bar it seems to me that we cannot escape the conclusion that each of these cars used into and out of the [fol. 151] state of Oklahoma did not have its taxable situs in this state.

For the foregoing reasons I am of the opinion that the State of Oklahoma has no jurisdiction to tax the entire number of 381 cars owned by the Johnson Oil Refining Company and that a tax so assessed is a violation of the 14th Amendment of the Constitution of the United States. I, therefore, most respectfully dissent.

[fol. 152] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

APPLICATION FOR STAY OF MANDATE—Filed Feb. 2, 1933

Now comes Johnson Oil Refining Company and moves the Court to enter an order staying and withholding the mandate, or mandates, in the above entitled causes, because it is the bona fide intention of Johnson Oil Refining Company, within the time provided by law, to appeal from the decision of the Court to the Supreme Court of the United States, or to make application to said Supreme Court of the United States for a writ of certiorari, as movant may be advised as to the proper procedure.

Johnson Oil Refining Company, by Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Its Attorneys.

[fol. 153] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

CERTIFICATE OF COUNSEL—Filed Feb. 2, 1933

In connection with the motion of Johnson Oil Refining Company to stay mandate in the above entitled causes, I hereby certify that it is the bona fide intention of Johnson

Oil Refining Company to prosecute an appeal from the decision and judgment of this Court in the above entitled causes to the Supreme Court of the United States, or to make proper application to said Court for a writ of certiorari, within three months from and after the overruling by this Court of the petition of Johnson Oil Refining Company for rehearing, and which petition was denied by said Court, and that I believe there is merit in said causes, and that the judgment of the Supreme Court of Oklahoma ought to be reversed by the Supreme Court of the United States.

Dated this 2d day of February, 1933.

A. A. Davidson, Counsel for Johnson Oil Refining Company.

[fol. 154] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

ORDER STAYING MANDATE—Filed Feb. 4, 1933

Motion of Johnson Oil Refining Company for a stay of the mandate herein came on to be heard *heard*:

On consideration whereof, it is now here ordered by the Court that no mandate of this Court issue in the above entitled and consolidated causes until April 1, 1933, and that if within said time Johnson Oil Refining Company shall have perfected an appeal to the Supreme Court of the United States, or if there is filed with the clerk of this Court a certificate of the clerk of the Supreme Court of the United States that a petition for certiorari and record have been filed in that Court, the stay hereinabove granted shall continue until the final decision of said causes in the Supreme Court of the United States.

Done by order of Conference.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

[fol. 155] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23218

[Title omitted]

PETITION FOR APPEAL—Filed March 16, 1933

[fol. 156] Now comes petitioner and appellant, Johnson Oil Refining Company, a corporation organized and existing under and by virtue of the laws of Oklahoma, and represents that on the 20th day of December, 1932, a judgment was rendered by the Supreme Court of Oklahoma in the above entitled and numbered cause, against the petitioner, in which it avers errors were committed to its prejudice, all of which will more fully appear from the following assignment of errors:

Wherefore petitioner and appellant, considering itself aggrieved by said judgment, prays that it be allowed an appeal therefrom to the Supreme Court of the United States, in order that the errors so complained of may be corrected.

Assignment of Errors

Now comes the appellant above named, and filing herewith its petition for appeal, says that in the record and proceedings, and in the decision in the above entitled cause, manifest error has intervened to the prejudice of your petitioner, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so [fol. 157] construed by the Supreme Court of Oklahoma is repugnant to the Constitution of the United States, particularly the Fourteenth Amendment thereto.

2. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma deprives the appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Oklahoma erred in reversing the judgment of the District Court of Pawnee County, Oklahoma, which held that the tax imposed by the taxing officials of Pawnee County, Oklahoma, in appellant's entire fleet of cars was a taking of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Oklahoma erred in holding that the assessment of a tax by the taxing officials of Pawnee County, Oklahoma, on the entire fleet of cars of appellant, an Illinois corporation having its principal office and place of business in Chicago, Illinois, was within and authorized by the statute of Oklahoma (Sec. 1, Ch. 44, Session Laws [fol. 158] 1915, p. 64) providing that all property in the State of Oklahoma, except such as is exempt, shall be subject to taxation, and that said statute as so construed was not invalid or repugnant to the Constitution of the United States and the Fourteenth Amendment thereof.

5. The Supreme Court of Oklahoma erred in holding and deciding that the entire fleet of cars had, within the meaning of the statute, an actual taxable situs in the State of Oklahoma, notwithstanding that the cars came into Oklahoma for the sole and only purpose of receiving a load of refinery products for transportation out of the state, and were only temporarily in the state for such purpose, and notwithstanding that none of the cars was kept, laid up, or stored in Oklahoma, but, except for short and unavoidable delays, all the cars were continuously in transit in interstate commerce.

6. The Supreme Court of Oklahoma erred in holding and deciding that appellant's entire fleet of cars was taxable in Pawnee County, Oklahoma, notwithstanding the fact that more than 300 cars of the fleet were, during the years for which the tax was imposed, continuously absent from the state (not the identical cars, but on an average), engaged in the marketing business of the appellant in other states, in which states the cars so engaged in business were taxed.

7. The Supreme Court of Oklahoma erred in holding and deciding that the appellant's entire fleet of railroad tank cars, employed and used by it in the transportation of refinery products out of Oklahoma to not less than 17 other states, for sale there, or in delivery to purchasers in such [fol. 159] states, and in which states the cars habitually entering therein for such purposes were taxed, was nevertheless taxable in the state of Oklahoma as an entirety, and that such tax was not in violation of the Constitution of the United States, and did not contravene the Fourteenth Amendment thereto.

8. The Supreme Court of Oklahoma erred in refusing to hold and decide that appellant's fleet of cars, shown to have been constantly employed, and in movement, in interstate commerce during the years for which they were assessed, did not and could not thereby acquire an actual situs for taxation in the State of Oklahoma.

Prayer for Reversal

By reason whereof, and for which errors petitioner and appellant, Johnson Oil Refining Company, prays that the judgment and decision of the Supreme Court of Oklahoma be reversed and judgment rendered in favor of the said appellant, and for costs.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant, Johnson Oil Refining Company.

[fol. 160] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23218

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 16, 1933

[fol. 161] The appellant in the above cause having prayed for the allowance of an appeal therein to the Supreme Court of the United States from the final judgment made and entered therein by the Supreme Court of Oklahoma on the 20th day of December, 1932 (petition for rehearing having been duly filed and thereafter denied on January 31, 1933), and from each and every part thereof, and having presented and filed its petition for appeal, and its assignment of errors with prayer for reversal, and upon due consideration thereof and of the record in said cause:

It is ordered that said petition for appeal be, and is hereby, granted, and that an appeal from the judgment of the Supreme Court of Oklahoma in said cause be, and is hereby, allowed, to the Supreme Court of the United States, upon petitioner filing an appeal bond in the sum of one thousand dollars, with sufficient sureties, and conditioned that appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make good its said plea.

It is further ordered that the Clerk of the Supreme Court of Oklahoma shall prepare and certify a transcript of the record, proceedings, and judgment, in said cause, and transmit the same to the Supreme Court of the United States.

The said appellant now presenting a bond in the sum of one thousand dollars, with United States Fidelity and Guaranty Company as surety, it is ordered, that the said bond be, and the same is hereby, approved.

In witness whereof, I have hereunto set my hand this 16th day of March, 1933.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

Attest:

Gus Pool, Clerk Sup. Ct., by Reuel Haskell, Jr., Dep.
(Seal.)

[fols. 162–164] Bond on appeal for $1,000, approved and filed March 16, 1933, omitted in printing.

[fol. 165] IN SUPREME COURT OF THE UNITED STATES

No. 23218

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed March 21, 1933

To the State of Oklahoma ex rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma:

There is hereby served upon you, as appellees, by copies thereof, the petition for appeal by Johnson Oil Refining Company, the assignment of errors filed therewith, and the order allowing appeal, in the above entitled cause.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Appellant.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for Appellees.

[File endorsement omitted.]

[fols. 166–180] Citation, in usual form, showing service on W. T. Cleeton and E. W. Clark, filed March 21, 1933, omitted in printing.

[fol. 181] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 21, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to prepare and certify a transcript of the record in the above entitled cause, for the use of the Supreme

Court of the United States, by including therein the following:

1. Petition in error and case-made attached thereto as Exhibit "A".
2. Motion to consolidate the cause with causes 23,219, 23,334 and 23,342.
3. Order of consolidation.
4. Minute of submission.
5. Minute of judgment.
6. Majority opinion of the Supreme Court.
7. Petition for rehearing.
8. Order denying petition for rehearing.
9. Dissenting opinion of Justice Swindell on rehearing.
10. Motion for stay of mandate and certificate of counsel.
10½. Certificate of Counsel.
11. Order staying mandate.
12. Petition for appeal.

[fol. 182] 13. Assignment of errors.

14. Order allowing appeal.
15. Bond on appeal.
16. Service of petition for appeal, assignment of errors and order allowing appeal.
17. Citation and service thereof.
18. Statement in support of jurisdiction under Rule 12 of the Supreme Court of the United States, and service thereof.
19. This præcipe.
20. Certificate of Clerk.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[File endorsement omitted.]

[fols. 183–198] IN SUPREME COURT OF OKLAHOMA

No. 23218

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed March 31, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to include in the transcript of the record in the above entitled cause, in addition to the matters included in the original præcipe, the following:

Appellee's statement against jurisdiction under paragraph 3, rule 12 of the rules of the Supreme Court of the United States, and service thereof.

This præcipe.

J. A. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 31 day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[File endorsement omitted.]

[fol. 199] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 200] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S DEFINITE STATEMENT OF THE POINTS UPON WHICH IT RELIES AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 7, 1933

[fol. 201] Statement of Points Relied On

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The statute of the State of Oklahoma, Section 9574 of the Compiled Statutes, 1921, providing,

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation,"

as construed and applied by the Supreme Court of Oklahoma in its judgment and opinion, and so as to bring within its provisions, as to taxability, appellant's fleet of cars, is repugnant to the Constitution of the United States in that it contravenes the Fourteenth Amendment thereto as depriving appellant of its property without due process of law.

Point 2. As, upon the undisputed facts, appellant, an Illinois corporation, was at all times engaged, in the State of its domicile, in the business of marketing refined petroleum products in interstate commerce; that the cars assessed were an investment in, and a facility of such business; that they were at all times employed in commerce among the states; that they came to Oklahoma as an incident to such commerce, and were temporarily within the [fol. 202] borders of the state, for the sole purpose of receiving a load of refined petroleum products, principally at appellant's refinery in Pawnee County, Oklahoma, for transportation out of the state, and for delivery in other states, either to appellant's customers, or for sale at its own bulk stations maintained in a number of states; that each car was in the State of Oklahoma for such purpose, on an average, about two days per month; that more than four-fifths of the number of cars, on an average, were continuously out of the State of Oklahoma, employed in their owner's business in other states, and in which states they were taxed, and the taxes thereon were paid; and that as no part of the fleet of cars had ever been laid up or stored, the fleet of cars was not property within the jurisdiction of the State of Oklahoma for taxation purposes, and the assessment of the entire fleet contravened the Fourteenth Amendment to the Constitution of the United States, as claimed by appellant.

Point 3. The domicile of the owner, as an Illinois corporation, furnished, prima facie, the situs of its fleet of cars for the purpose of ad valorem taxation, and the fact that cars of the fleet came habitually to appellant's refinery in Pawnee County, Oklahoma, to be loaded with interstate merchandise for transportation out of the state, and for such purpose only, did not operate to change such situs, or authorize the taxing authorities in Oklahoma to assess a

tax thereon, and such tax contravenes the Fourteenth Amendment to the National Constitution.

[fol. 203] Point 4. The continuous movement of appellant's cars, both within and without the jurisdiction of Oklahoma, in interstate commerce, and for the transportation of refinery products from Oklahoma to, and for the distribution thereof in, other states, cannot operate to fix a situs for the entire fleet at the location of appellant's refinery, or at any other place, in the State of Oklahoma.

Point 5. The judgment of the Supreme Court of Oklahoma that the taxable situs of appellant's fleet of cars was at its refinery in Pawnee County, Oklahoma, is in conflict with the undisputed facts and the legal effect thereof, and with the fundamental basis of taxation, and the assessment of a tax thereon deprived appellant of its property without due process of law.

Point 6. The legal situs of the cars at the domicile of appellant, and in other states where they are employed and where they have been taxed, presumably in proportion to the protection afforded them by the laws of such states, precludes, upon established principles of taxation, the right of Oklahoma to levy a tax upon the entire assessable value of the entire fleet, in that the State is not called upon to protect, and cannot, upon the undisputed facts, afford the protection of its laws to, the entire fleet.

Point 7. The Supreme Court of Oklahoma committed reversible error in affirming the judgment of the County [fol. 204] Court of Pawnee County, Oklahoma, and in thereby denying the claims of appellant to the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

Designation of Parts of Record to be Printed

The appellant states that it considers only the following parts of the record necessary for consideration of the points upon which it intends to rely:

Pages 1 to 8, both inclusive.
Pages 9 and 10.
Pages 12 to 14, both inclusive.

Pages 15 and 16.

Beginning with page 27, and continuing to the 5th line of page 36, ending with the words "That is all".

Beginning on page 39 with the words "G. C. Lilly (recalled)", and continuing to the 13th line of page 40, ending with the words "That is all".

Beginning on page 43 with the words "Direct Examination: Mr. Clark", to the 14th line of page 45, ending with the question and answer, "Q. And it is considered accurate? A. Yes."

Beginning with the 18th line on page 46 with the words "Cross Examination by Mr. Davidson", and continuing to page 47, including the first six lines on said page.

Beginning on page 51 with the words "G. C. Lilly being recalled, in open court deposes and says", and continuing to the bottom of page 77.

[fol. 205] All of pages 89 and 90.

All of page 100.

Beginning with page 101, and continuing to and including page 105.

Beginning with page 106, and continuing to and including 108.

Print the remaining part of the record from pages 113 to 199, both inclusive.

Respectfully submitted.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant.

We hereby acknowledge service, by copy, of the foregoing and agree thereto this 31st day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; J. Berry King, Attorney General of Oklahoma, by F. M. Dudley, Assistant Attorney General of Oklahoma; Ed. Waite Clark, Special Counsel, Attorneys for Appellees.

[fol. 206] [File endorsement omitted.]

Endorsed on cover: File No. 37,540. Oklahoma Supreme Court. Term No. 22. Johnson Oil Refining Company, appellant, vs. The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al. Filed April 7, 1933. No. 22, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 843

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL., C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court on appeal from the Supreme Court of Oklahoma is invoked by reason of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344) having reference to appellate jurisdiction of the decrees of State courts by writ of error:

> "* * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

And the Act of January 31, 1928 (Ch. 14, 45 Stat. 54) abolishing the writ of error and providing that all relief which theretofore could be obtained by writ of error shall thereafter be obtainable by appeal, and by the Act of April 26, 1928 (Ch. 440, 45 Stat. 466) with reference to such appeals.

B.

Statute of the State of Oklahoma, the Validity of Which is Involved.

The statute of Oklahoma, the validity of which as construed by the Supreme Court of Oklahoma, involved in this case is Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921), which reads as follows:

"All property in this State, whether real or personal, including the property of corporations, banks, and bankers, except such as is exempt, shall be subject to taxation."

C.

Date of the Judgment Sought to be Reviewed and Date Upon Which Application for Appeal Was Presented.

The judgment of the Supreme Court of Oklahoma, which is sought to be reviewed, was entered on December 20, 1932 (R. 121).

A petition for rehearing was duly filed and was denied by said court on January 31, 1933 (R. 137). The application for appeal to the United States Supreme Court was presented to the Supreme Court of Oklahoma on March 16, 1933, and allowed on March 16, 1933 (R. 160).

D.

Nature of Case and Rulings Below.

The above cause, and the judgment therein, involves the validity of an assessment for taxation by the taxing officers of Pawnee County, Oklahoma (amounting to over $756,000) of a fleet of approximately 380 tank cars belonging to appellant, Johnson Oil Refining Company, for the years 1925, 1926, and 1927, as property not listed for taxation for said years.

Appellant is a corporation of the State of Illinois, engaged in the marketing of refined petroleum products, and which business is conducted at its domicile.

It is admitted that the cars are engaged in interstate and intrastate commerce, and are used by the Johnson Oil Refining Company to transport its products from its refinery in Pawnee County, Oklahoma, to various points within and without the State in pursuance of its marketing business. It is further admitted that about ninety-nine per cent of the use of the cars was in interstate business; that each car was in the State, on an average, of about two days per month, and that they came into the State for the sole purpose of receiving a load of refinery products. Nevertheless, the entire assessable value of the entire fleet was held taxable by the Supreme Court of Oklahoma under the Oklahoma statute above referred to.

The case originated under a statute of Oklahoma, being Chapter 38, Article III, Session Laws 1909, p. 626, as amended by Chapter 189, Session Laws of 1915, p. 386 (Article XIII, Chapter 84, Oklahoma Statutes 1921, p. 3235), providing a procedure for the assessment by county treasurers of property not listed and assessed, and providing for an appeal from the action of the county treasurer to the County Court of the County, and from said court to the Supreme Court of Oklahoma. The County Treasurer of Pawnee County, over appellant's objection that he was without jurisdiction, assessed the entire fleet of cars of Johnson Oil Refining Company for the years 1925, 1926, and 1927 (R. 15). On appeal to the County Court of Pawnee County, and at the trial of the cause, Johnson Oil Refining Company specifically objected to the proposed assessment for taxation on its entire fleet of cars as unconstitutional, as depriving it of due

process of law, and as contravening the Fourteenth Amendment to the Constitution of the United States (R. 28). Notwithstanding such objection, the County Court confirmed and approved the assessment of the County Treasurer, and, notwithstanding a motion for new trial on the ground that the decision of the court deprived appellant of its rights claimed under the Fourteenth Amendment to the Constitution of the United States, entered such judgment (R. 106), and Johnson Oil Refining Company appealed to the Supreme Court of Oklahoma, assigning as error that the judgment of the County Court deprived Johnson Oil Refining Company of its property without due process of law and in contravention to the Fourteenth Amendment to the Constitution of the United States (R. 1).

The cause was consolidated in the Supreme Court, by order of that court, with three other causes on appeal from the County Court of Pawnee County, the District Court of Pawnee County, and the County Court of Osage County, Oklahoma (R. 119), being Nos. 23,219, 23,334, and 23,342 in the Supreme Court, each of which involved the validity of a like assessment on the same cars, and all of which consolidated causes, and the record therein, were considered and decided by the Supreme Court of Oklahoma in the same opinion (R. 122).

The Supreme Court of Oklahoma held that the entire fleet of cars was taxable in and by Pawnee County, Oklahoma, for the years specified, and affirmed the judgment of the County Court of Pawnee County, Oklahoma (R. 122).

In pursuit of the Company's marketing business, the cars habitually entered 17 different States during the course of a year, in which States they were taxed according to value, and the tax thereon was paid (R. 60-61-75). Such tax was, presumably, in accordance with the right of the States to so tax them under appropriate legislation, as repeatedly held by the Supreme Court of the United States.

Eidman v. *Martinez,* 184 U. S. 578.

American Refrigerator Co. v. *Hall,* 174 U. S. 70.

Pullman Palace Car Co. v. *Pennsylvania,* 141 U. S. 18.

Union Refrigerator Co. v. *Lynch,* 177 U. S. 149.

The record further shows that the property of Johnson Oil Refining Company, including its tank cars, is taxed at its domicile in Illinois, upon a valuation of its entire property which has not paid taxes elsewhere (R. 63).

It is the contention of appellant that the Statute of Oklahoma (Sec. 1, Ch. 44, Session Laws 1915, p. 64; Sec. 9574 C. O. S. 1921) as construed and applied by the Supreme Court of that State is unconstitutional, and that under Section 237 of Judicial Code, amended (U. S. C. A. Title 28, Sec. 344), Act of January 31, 1928 (Ch. 14, 45 Stat. 54) and Act of April 26, 1928 (Ch. 440, 45 Stat. 466) this Court has jurisdiction by appeal.

Said statutes apply not merely in cases where the validity of a State statute in its bare words is drawn into question, but also in cases where the validity of

the statute *as construed* by the highest court of the State is brought into question.

In determining the problem of the right of appeal in such cases the statute as presented to this Court in the record must be read just as though there were included in its language to the effect that the tank cars, such as these involved and used in the instant case should be taxed in full by the State of Oklahoma.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

In *Knights of Pythias* v. *Meyer*, 265 U. S. 30, this Court said with reference to the construction of a Nebraska statute:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the State Legislation as though such meaning had been specifically expressed therein."

In *Appleby* v. *City of New York*, 271 U. S. 364, this Court entertained jurisdiction on writ of error and reversed a judgment of the highest court of the State of New York, which had construed certain statutes of that State in such a manner that they contravened the Constitution of the United States. The statutes in question did not specifically, in so many words, cover the situation, but needed construction. In stating the

case Justice Taft pointed out, page 366, that the highest court of New York upheld the statutes of New York and enforced them in such a way as to impair the obligation of the plaintiff's deed in violation of Section 10 of Article One of the Federal Constitution. In his opinion, Justice Taft says, page 379:

> "The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has interpreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.
>
> "The questions we have here to determine are, first, was there a contract; second, what was its proper construction and effect; and third, was its obligation impaired by subsequent legislation as enforced by the State court?"

In *Ward & Gow* v. *Krinsky*, 259 U. S. 503, this Court took jurisdiction on writ of error in a case where the New York court construed a New York statute and upheld it as so construed. This Court said, page 510:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the State law adopted by its court of last resort; * * *. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon State action."

In *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, the Supreme Court of Illinois upheld the validity of an Illinois statute on the particular construction placed

upon it by that court. This Court took jurisdiction on a writ of error. The court said, page 509:

> "It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning; but it is not true that this Court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis Southwestern Railway* v. *Arkansas*, 235 U. S. 350, at page 362, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:
>
> " 'Upon the mere question of construction we are of course concluded by the decision of the State court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court. We must regard the substance, rather than the form and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.' "

In *Alabama Railway Co.* v. *Jackson Ry. Co.*, 271 U. S. 241, this Court on writ of error reversed a decision of the state court which construed and upheld a statute of the State of Alabama.

In *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76, this Court entertained jurisdiction on a writ of error of a

case in which the Court of Appeals of Kentucky upheld a tax on certain lines of railway under a statute of the State, and reversed the State court's construction and application of the statute.

See also:

Anglo-Chilean Nitrate Sales Corp. v. *Alabama*, U. S. No. 377, October Term, decided February 6, 1933;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board*, U. S. No. 51, October Term, 1932, decided December 5, 1932.

Bryant v. *Zimmerman*, 278 U. S. 63.

Alpha Cement Co. v. *Massachusetts*, 268 U. S. 203.

We therefore respectfully submit that this Court has jurisdiction.

CHAS. Y. FREEMAN,
J. A. McCOLLUM,
PRESTON C. WEST,
A. A. DAVIDSON,
Attorneys for Appellant.

FILE COPY

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CHARLES ELMORE

IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

Nos. 22, 23, 24.

JOHNSON OIL REFINING COMPANY, *Appellant,* *vs.* **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 22.**
JOHNSON OIL REFINING COMPANY, *Appellant,* *vs.* **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 23.**
JOHNSON OIL REFINING COMPANY, *Appellant,* *vs.* **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 24.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR THE APPELLANT.

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Counsel for Appellant.

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McCULLUM & McCULLUM,
Pawnee, Oklahoma.
Of Counsel.

THE BUNTHORP-WARREN PRINTING COMPANY, 210 WEST JACKSON, CHICAGO

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1933.

Nos. 22, 23, 24.

JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 22.**
JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 23.**
JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 24.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

BRIEF FOR THE APPELLANT.

A.

A single opinion of the Supreme Court of Oklahoma involving four cases, in three of which these appeals are taken, is reported in 162 Oklahoma, 185, and may also be found in 19 Pacific Reporter (2) 169, and at page 57 of the record filed in this court in case No. 22.

A single opinion was rendered, as all four cases involved a single question and were consolidated in that court for hearing. (October 1933 term No. 22-R 47, 48.) Separate judgments were entered in each of the four cases so consolidated. Of the three involved before this court as captioned above, two were consolidated in the trial court, and all three were based on practically the same evidence. There is but one question at issue, which is the same in each case. The records filed in this court, except as to certain formal entries of orders, etc., are practically the same.

Hence in the interest of brevity we submit herewith but one brief and argument, and will refer throughout to record in case No. 22, October term 1933, except as specific reference to the other records may be necessary.

B.

JURISDICTION.

The statements as to jurisdiction having been filed in accordance with the rule of this court, paragraph 1 of Rule 12, and the court having entered its orders noting probable jurisdiction thereon, we respectfully refer to said statements as to jurisdiction for the grounds upon which the court was asked to assume jurisdiction.

C.

STATEMENT.

1. THE QUESTION INVOLVED AND THE ACTIONS OF THE OKLAHOMA COURTS THEREON.

These appeals challenge the right of Oklahoma to tax the appellant, a corporation of the State of Illinois, upon its entire fleet of approximately 387 oil tank cars which during the taxable years in question were constantly employed by it in interstate commerce, and, were actually in Oklahoma only for brief periods of time.

The tax was imposed in each case, despite constitutional objections to be more specifically referred to, on the entire fleet of cars and for their full value on the strength of a statute of the State of Oklahoma, Sec. 1, Chap. 44, Session Laws, 1915, page 64 (Sec. 9574, C. O. S. 1921) which reads as follows:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

The actions of the Supreme Court and the trial courts of Oklahoma in the cases imposing the tax may be summarized as follows:

First. No. 22. This cause was numbered in the Supreme Court of Oklahoma 23218, and involved the right of *Pawnee* County, Oklahoma, to tax for the years *1925, 1926 and 1927* the entire fleet of 387 tank cars on their entire value. It originated under a statute of Oklahoma (see appendix to this brief, page 1, for full copy) through a notice to the Johnson Oil Refining Co. (hereafter referred to as Johnson Co.) by the County Treasurer of a proposed assessment of its entire fleet of tank

cars as property omitted from taxation for the three years in question (22 R. 4). Johnson Co. objected to the proposed assessment, and to the jurisdiction of the County Treasurer to make such assessment, as the property was not located in Oklahoma, and had no taxable situs in his county (R. 6-7). The County Treasurer nevertheless ordered the entire fleet assessed for each of the respective years (R. 8), but no assessment was entered on his books pending an appeal, as provided by statute, where the hearing was *de novo* as a civil action (*Anderson* v. *Ritterbusch*, 22 Okla. 761, 98 Pac. 1009). At the first opportunity, in the County Court of Pawnee County, to which the appeal was taken, and at the request of the court to state the issues involved, Johnson Company objected to the proposed assessment, on the ground that it was in contravention of the Fourteenth Amendment to the Constitution of the United States (22 R. 9-10). The court ruled to the contrary, and the objection was repeated on motion for new trial (22 R. 39-42), which motion was overruled and judgment entered ordering that there be spread on the assessment roll of Pawnee County an assessment against Johnson Company, on the entire fleet of cars, for the years mentioned, in the sum of $570,000, and that a tax be entered on the tax rolls of the county in accordanee with said assessment (22 R. 42-44.). Finally on appeal to the Supreme Court of Oklahoma the same constitutional objections were raised (22-R. 2, 3), but the judgment of the lower court was affirmed (22-R-50, 51).

Second. No. 23. This cause was numbered in the Supreme Court of Oklahoma 23219, and also involved the right of Pawnee County, Oklahoma, to tax the same fleet of cars, but for the year *1928*. It originated under exactly the same procedure as the preceding case, and was consolidated for hearing with it, and the judgment of

the lower court was that the entire fleet be taxed (23-R.-37). The same constitutional objections were raised in this proceeding (23-R.-8, 9, 39, 40). On appeal to the Supreme Court of Oklahoma constitutional objections were again specifically made (23-R. 2, 3) but the judgment of the lower court was affirmed (23-R. 48).

Third. This cause was numbered in the Supreme Court of Oklahoma 23242, and also involved the right of Pawnee County, Oklahoma, to tax the entire fleet of cars, but for the year *1931.* The cause originated, however, before the *Board of Equalization* of that County by notice of proposed assessment of 387 cars for $700 each (24-R. 6), and an order to that effect was entered after a full hearing on evidence practically the same as in the two cases above referred to (24-R. 25). A review of the order was had on appeal under the Oklahoma statute of 1921, Section 9966, in the *District* Court of Pawnee County. The court sustained the objection by the taxpayer that the tax as proposed was unconstitutional and would violate the Fourteenth Amendment to the Constitution of the United States and held that taxation of the entire fleet would amount to a taking of the property of the taxpayer without due process of law, in violation of the Fourteenth Amendment to the Constitution (24-R. 30, 31) and entered its order that the "average" number of cars in the State of Oklahoma, which was found to be 64, should be assessed for taxation in Oklahoma. From that judgment both the County Board of Equalization and the taxpayer appealed to the Supreme Court of Oklahoma (24-R. 2, 3, 32, 33). The taxpayer therein again specifically objected that the inclusion in the assessment against it for taxation of even a portion of the tank cars amounted to a taking of its property without due process of law in violation of the Four-

teenth Amendment to the Constitution of the United States (24-R. 4, 5). The objection also was raised that there was no statute of the State of Oklahoma fixing the situs of such cars, or any portion thereof on the basis of an average of such cars physically present in Pawnee County (24-R. 4 and 5). The Supreme Court of Oklahoma reversed the District Court of Pawnee County in the appeal of the Board of Equalization and held that the entire fleet of cars was taxable for its entire value in Pawnee County for the year in question 1931 (24-R. 37, 41).

Fourth. The fourth case included in the opinion of the Supreme Court of Oklahoma and in which no appeal is taken to this court was numbered in the Supreme Court of Oklahoma 23334 and involved the right of *Osage* County, Oklahoma, a county adjoining Pawnee County, also to collect a tax upon 50 of the same fleet of cars already taxed in the those cases by the adjoining county, and for the same years. The lower court of Oklahoma entered judgment authorizing the tax. On appeal of the Johnson Oil Company the Supreme Court of Oklahoma reversed the lower court (22-R. 50). Hence no appeal is now pending in that particular phase of the matter. It is merely mentioned to avoid any confusion in reading the opinion of the Supreme Court of Oklahoma.

The decision of the Supreme Court of Oklahoma was rendered on the 20th of December, 1932 (22-R. 51). A petition for rehearing was duly filed January 14, 1933 (22-R. 54) where the same constitutional questions were again raised (22-R. 55), and said petition for rehearing was denied on the 31st day of January, 1933 (22-R. 58; 23-R. 56), at which time Judge Swindall of the Oklahoma Supreme Court rendered a dissenting opinion fully sustaining the taxpayer in its contention that the construction of the tax statute of Oklahoma so as to tax the en-

tire fleet of cars was a violation of the Fourteenth Amendment to the Constitution of the United States (R. 58). A petition for appeal to this court was filed March 16, 1933 (22-R. 72; 23-R. 70; 24-R. 59), and an order allowing said appeal was entered on the same date (22-R. 75; 23-R. 73; 24-R. 62).

2. Facts.

The appellant, Johnson Company, was during the years in question an Illinois corporation (22-R. 22; 24-R. 9) licensed to do business in Oklahoma (22-R. 11). It has its principal office and place of business in Chicago, Illinois. The main and principal business of the Company is the marketing and distributing of refined petroleum products (22-R. 21, 22).

That business is almost exclusively interstate (22-R. 12, 22, 31; 24-R. 10), and in its transaction the company employs a large fleet of tank cars, some 387 in number (22-R. 12; 24-R. 10, 17, 18). Ninety-nine per cent of the use of these cars is in interstate commerce (24-R. 23).

The company began operations in 1914, and in 1922 for the purpose of securing a better supply of dependable products bought, and has since operated, a refinery in Cleveland, Pawnee County, Oklahoma (22-R. 22). The products of the refinery constitute the bulk of its merchandise, although it continues to purchase and market like products from other refineries (R-22). The cars are used in its marketing business generally, none of them being allotted or set aside to the refinery (No. 24, R-68). Almost the entire product of the refinery is transported out of the State of Oklahoma either to appellant's customers or to bulk stations owned and operated by it in the states of Indiana, Illinois, Missouri and Wisconsin (22-R. 12; 24-R. 10).

The average time occupied by the shipment and delivery of a load and the return of the empty cars to the refinery for another load is 20 days (R-14). The cars therefore come to Oklahoma on an average of about once and a half a month (R-14). At the trial, it was variously estimated that between 37 and 66 cars were on an average in Oklahoma during the respective years. (22-R. 17, 29). Another estimate was made that 16 per cent of the number of cars owned by the company were on an average in Oklahoma, and about 84 per cent on an average somewhere in transit outside of Oklahoma (24-R. 11).

The cars are used in the appellant's business wherever needed and their movements are directed from the Chicago office of the company (R-23). The office of the company at Cleveland is a record office only, and has nothing to do with the marketing business which is handled entirely from the general office in Chicago (R-23, 27). The cars that do come to the state come for the sole purpose of receiving refinery products to be shipped out of the state (R.-23). The time necessary to load a car is about 24 hours (R.-14, 23).

The cars are an investment in the appellant's marketing business and not in the refinery. They are not a plant facility (R.-34).

Loaded cars are received by the Missouri, Kansas & Texas Railroad at the refinery and are routed over connecting routes to points of delivery. Appellant always has immediate use for its cars (R. 34), in fact they are never at rest in storage, but are continually employed in commerce among the states (R. 21, 34).

The cars when they have been relieved of their load at the point of destination are routed back to the refinery located at Cleveland, unless orders are given to the contrary, in which case they are generally sent to

other places to pick up merchandise which has been bought for marketing by the company (22-R. 13, 23, 33; 24-R. 19, 21). An order is given on the bill of lading directing that the car be returned to Cleveland. This is for the convenience of the customer so he can know the return point to which he is to route the car (R. 34).

Cars are repaired generally by the railroads upon which they are being used at the time the repairs become necessary. Major repairs are made in Kansas (22-R. 28). Only minor repairs are made at the Cleveland plant (22-R. 28; 24-R. 15, 18, 22), and all bills for these repairs are sent to the Chicago office.

Taxes for the years in question were paid by the Johnson Oil Refining Company on these same cars in a large number of states into which the cars travel to make delivery of the refinery products the company has sold (22-R. 25; 24-R. 14).

D.

SPECIFICATIONS OF ERRORS RELIED ON.

The assigned errors in this court are to be found at 22-R. 72. These errors stated in various forms are reducible to one, namely, that the construction of the tax statute in question as put upon it by the Supreme Court of Oklahoma, and as applied in these cases, is repugnant to the Constitution of the United States, particularly, the Fourteenth Amendment thereto, for the reason that as so construed it constitutes the taking of property of the Johnson Company without due process of law.

E.

SUMMARY OF THE ARGUMENT.

No state has the power to tax tangible personal property which is not within its territorial limits.

The imposition of a tax by a state upon tangible personal property not within its territorial limits is a violation of the Fourteenth Amendment to the Constitution of the United States.

This rule applies to movable tangible property which at times is within, and at times without, the territorial jurisdiction of the state.

When movable tangible personal property is in and out of the state for considerable periods of time, the state has power to tax such property only to the extent that it is within its borders. Such taxation must be based upon a formula which will fairly and distinctly reflect the extent to which the property is within the territorial limits of the taxing state.

While the state has such a power the tax can only be imposed when a method within the rules above referred to has been definitely provided for in the statutes of the state.

The cars of the Johnson Oil Refining Company having been taxed in other jurisdictions to the extent that they were in such jurisdictions precludes taxation of the same cars in Oklahoma for the entire period of time and to the extent of their entire value.

The cars of Johnson Oil Refining Company were in and out of the State of Oklahoma and were not within its jurisdictional limits for a large proportion of the time. Therefore, the taxation of the entire fleet of such cars to the extent of their entire value was beyond the

power of the State of Oklahoma, and constitutes a violation of the Fourteenth Amendment of the Constitution of the United States. Hence, the construction by the Supreme Court of Oklahoma of the statute in question violated the Fourteenth Amendment to the Constitution, and the judgments of that court to that effect should be reversed.

F.

ARGUMENT.

I.

THE OKLAHOMA STATUTE AS CONSTRUED BY THE SUPREME COURT OF OKLAHOMA, CONSTITUTES A TAKING OF PROPERTY WITHOUT DUE PROCESS OF LAW IN VIOLATION OF THE FEDERAL CONSTITUTION.

The Oklahoma statute, already quoted, for convenience sake is again herewith set forth:

> "All property in this State, whether real or personal * * * shall be subject to taxation."

The construction put upon this statute by the Supreme Court of Oklahoma is that the entire fleet of tank cars belonging to the Johnson Oil Refining Company are included in the language, "all property in this State," although those cars were in the state but for short periods of time. That construction by the highest court in the State of Oklahoma must, under the many decisions of this court, be accepted as though the statute in words so read.

Pythias v. *Meyer*, 265 U. S. 30.
Hanover v. *Harding*, 272 U. S. 494.

But the statute as so construed, we maintain, is unconstitutional.

It is fundamental that no state has the power to tax tangible personal property which is not within its territorial limits. Such property cannot acquire an actual situs within the state unless it is actually within the territorial limits of the state.

The decisions of this court establish that proposition.

They further establish the proposition that any attempt to levy such a tax on tangible personal property not within its territorial limits is a violation of the Fourteenth Amendment to the Constitution of the United States.

The Supreme Court of Oklahoma rests its decision to the contrary on a theory that the base of operations for the cars in question was the plant of the Company at Cleveland, Oklahoma, and that they therefore had a definite situs at that point and were there subject to taxation. (R. 52.) The distinction sought to be drawn is between, first, cars which are used in and out of the state indiscriminately without reference to any particular place in the state, and second, cars which are in and out of the state but used with reference to one particular base of operations. The first class the Supreme Court of Oklahoma impliedly concedes would not be taxable. The second class the court holds is taxable. We respectfully submit that no such distinction exists in the rules laid down by this court in its many decisions on this question. On the contrary the reason of the rule precludes any such distinction.

Manifestly, as taxation and protection are reciprocal obligations, the fact that the cars might be used with reference to a single point in the State of Oklahoma, rather than several points, could not enlarge the protection acorded them in Oklahoma, nor lessen the protection accorded the same cars by other states, and their consequent right to tax them in proportion to the protection afforded by the laws of such states.

The true rule with regard to the taxation of tangible personal property is as stated above, and has been settled by the decisions of this court, particularly the case

of *Union Refrigerator Transit Company* v. *Kentucky*, 199 U. S. 194, which is determinative of the entire question. The distinction advanced by the Oklahoma court ignores this rule. In fact it ignores each of the cases of this court which define the rights of states under the constitution in a matter of this sort. Not one of the many decisions of this court is cited in the Oklahoma opinion in support of its judgment though of course they were urged by counsel for the Johnson Oil Company as fundamental considerations in the questions before the court, and the dissenting opinion of Judge Swindall in that court is entirely based on those decisions. We respectfully refer the court to that dissent as a correct statement of the rule of law applicable to this case and as a demonstration of what the decision of the Oklahoma Supreme Court should have been. (R. 58.)

In the case above mentioned of *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, it appears that the State of Kentucky was the taxing authority that imposed the tax. The corporation taxed was of the same state. The home office of the company was also in Kentucky, while its principal office was in St. Louis. (See report of case in opinion of the Court of Appeals of Kentucky, 118 Ky. 131; 80 S. W. 490.)

The corporation owned 2,000 refrigerator cars which it leased out to various parties for use in transportation of goods throughout the United States, Mexico and Canada. The Kentucky statute provided for a taxation of all personal property of corporations organized under the laws of the State of Kentucky "whether the property be in or out of the State." Under this statute a proceeding was instituted to force the company to list the 2,000 cars for state and county taxation. The company resisted and the lower court partially sustained it, to the extent of requiring it to list only such a propor-

tion of the cars as would truly reflect the average number in use in Kentucky during the fiscal year. Under this formula the court found that there was subject to taxation in Kentucky 28 cars for the year 1897, 29 for '98, 40 for '99, and 1,600 for 1900. The remainder were held not subject to taxation in Kentucky. The State of Kentucky appealed to the Circuit Court where the judgment was affirmed. On further appeal by the state the Court of Appeals of Kentucky reversed the lower courts, holding that the company was liable to taxation under the statute upon its entire fleet of 2,000 cars. The court based its holding upon the maxim *mobilia sequuntur personam.*

When the case came to this court on appeal by the Transit Co. the decision was reversed. In its opinion this court notes that the statute quoted above was attacked as being unconstitutional on two grounds, that it denied equal protection of the law and that it denied to the Transit Company due process of law. The court, after reviewing all of the authorities and general principles involved, holds that the statute was unconstitutional as taking property without due process of law, and says: (page 211)

> "We are of opinion that the cars in question, so far as they were located and employed in other States than Kentucky, were not subject to the taxing power of that Commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

The court says on page 202:

> "The power of taxation indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares, such, for instance, as

roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another State to which it may be said to owe an allegiance and to which it looks for protection, the taxation of such property within the domicil of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature and a taking of property without due process of law."

And again the court said, on page 204:

"It is also essential to the validity of a tax that the property shall be within the territorial jurisdiction of the taxing power. Not only is the operation of state laws limited to persons and property within the boundaries of the State, but property which is wholly and exclusively within the jurisdiction of another State, receives none of the protection for which the tax is supposed to be the compensation. This rule receives its most familiar illustration in the cases of land which, to be taxable, must be within the limits of the State. Indeed, we know of no case where a legislature has assumed to impose a tax upon land within the jurisdiction of another State, much less where such action has been defended by any court. It is said by this court in the *Foreign-held Bond* case, 15 Wall. 300, 319, that no adjudication should be necessary to establish so obvious a proposition as that property lying beyond the jurisdiction of a State is not a subject upon which her taxing power can be legitimately exercised."

The dissenting opinion of Judge Swindall of the Supreme Court of Oklahoma rests largely upon the Union Refrigerator Transit Company case. The majority opinion without making any reference to it whatsoever seeks to obviate its effect by drawing the distinction above referred to, as follows:

"It (Johnson Oil Refining Company) asserts that

the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. When this property is away from that point it is in transit; but its destination is always Cleveland, Pawnee County, Okla. So the property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Within the terms of the statute these cars constitute "property within this State." They are merely temporarily absent at times from Cleveland refinery and then in transit for delivery of products at various points. The entire number of tank cars are taxable in Pawnee county." (R. 22.)

In taking this position the court adopted the theory of attorneys for the State of Oklahoma that railroad cars working out of a given point acquire a situs at that point. To this theory they have given the name "the home port" theory. There is no adequate evidence in the record to establish the proposition that the cars in question come within their definition of "home port," but we pass that contention by, as no decision of this court either before or after the Union Transit case, contains any basis for the conclusion that any such distinction exists in law. The fact of the matter is the distinction is entirely contrary to the reason for the rule as laid down in the Union Transit case. We call particular attention to the first reason advanced, namely, that the matter of taxation is reciprocal to the matter of protection, and where the property is not subject to the protection of the state, and in fact is outside of the state's territorial limits it cannot be taxed. The court says, at page 204:

"The argument against the taxability of land within the jurisdiction of another State applies with

> equal cogency to tangible personal property beyond the jurisdiction. It is not only beyond the sovereignty of the taxing State, but does not and cannot receive protection under its laws, * * *"

That statement leaves no room for any such theory as advanced by the Oklahoma court. It would be repugnant to the rule to tax a car for its entire value merely because it could be shown as a matter of fact that the car was loaded at a plant in the state in question, left it at once for long journeys through other states, and then came back to the same plant for a repetition of the process. The result is the same. The car is within the borders of the taxing state, subject to its jurisdiction for only a small percentage of the time. And just what bearing on the subject has the fact that the cars operate out of a single place rather than out of a number of places? Certainly if the fact of incorporation by the taxing state (as was the situation in the Union Transit case, above cited) is not sufficient to create a situs in that state for the corporation's tank cars moving in and out of the state, what merit can there be in the assertion that the mere fact that tank cars are moving in and out of a *single plant in a state,* rather than many plants in many states, is sufficient to create a taxable situs of such cars at that plant?

The second reason for the rule as advanced by this court in the *Union Transit* case is:

> "It is essential to the validity of the tax that the property shall be within the territorial jurisdiction of the taxing power." (204)

The cars when they left the State of Oklahoma were not within its territorial jurisdiction, whether in leaving the state they left a single plant or any other place within the state or whether they left to stay out or left to come back.

The rule of law that controls this case may be summed up as follows:

The situs of personal property is the situs of the state of the domicile of the owner, unless it is shown that a different situs exists.

When it is shown that tangible personal property is actually located in a State other than the domicile of the owner, the situs for such property for taxation purposes is the State wherein it is actually located.

When tangible personal property such as a railroad car is in and out of a State, whether at some particular plant or indiscriminately, it has a situs in the State for taxation purposes only for the time that it is actually there.

The rule does not apply to intangibles. They are taxed at the owner's domicile for the purely practical reason that they cannot be found elsewhere.

In one of the most recent discussions by this court of the situs for taxation purposes of personal property, *First National Bank* v. *Maine*, 284 U. S. 312, this court reviewed many of the authorities, among others, the case of *Frick* v. *Pennsylvania*, 268 U. S. 473. That was an inheritance tax case from the State of Pennsylvania, which was the domicile of Mr. Frick. That state imposed a transfer tax on certain tangible personalty having its actual situs in New York. This court held such tax was unconstitutional. In the Maine case above spoken of this court with reference to the Frick case said, in part (page 322):

> "It was by the Frick case, however, that the rule became definitely fixed that, as to tangible personal property, the power to tax is exclusively in the State where the property has an *actual* situs; and this, as will be seen later, has an important bearing on the present case. * * * We decided, pp. 488-492, that the Pennsylvania tax, in so far as it was im-

posed upon the transfer of tangible personalty having an actual situs in other states, was in contravention of the due process clause of the Fourteenth Amendment. Upon a review of former decisions, it was held (1) that the exaction of a tax beyond the power of the state to impose was a taking of property in violation of the due process clause; (2) that while the tax laws of a state may reach every object which is under its jurisdiction, they cannot be given extraterritorial operations; and (3) that as respects tangible personal property having an *actual* situs in a particular state, the power to subject it to state taxation rests exclusively in that state, regardless of the owner's domicile.

The tax there under consideration was not a property tax, but one laid on the transfer of property on the death of the owner, and as to that the court said (p. 492):

'But to impose either tax the State must have jurisdiction over the thing that is taxed, and to impose either without such jurisdiction is mere extortion and in contravention of due process of law'." (Italics ours.)

The court then cites with renewed approval the *Union Transit Company* case, 199 U. S. 194; *Rhode Island Trust Co.* v. *Doughton*, 270 U. S. 80, and certain recent cases as follows:

Safe Deposit & T. Co. v. *Virginia*, 280 U. S. 83.
Farmers Loan Company case, 280 U. S. 204.
Baldwin v. *Missouri*, 281 U. S. 586.
Beidler v. *South Carolina Tax Commission*, 282 U. S. 1.

This court continues its opinion in the case of *First National Bank* v. *Maine* (*Supra*) (284 U. S. 312, 326).

"It long has been settled law that real property cannot be taxed, or made the basis of an inheritance tax, except by the state in which it is located. More recently it became settled that the same rule applies with respect to tangible personal property. And it now is established by the three cases last

cited, that certain specific kinds of intangibles, namely, bonds, notes and credits, are subject to the imposition of an inheritance tax only by the domiciliary state; and this notwithstanding the bonds are registered in another state, and the notes secured upon lands located in another state, resort to whose laws may be necessary to secure payment."

These cases clearly demonstrate that the rule as laid down in the *Union Transit Company* case is the rule today, and that tangible personal property such as freight cars traveling in and out of many states could not possibly acquire an *actual* situs in one state to the *exclusion* of the other states for the entire time because of the simple fact that they were operating out of one plant in one of the states instead of indiscriminately.

The decision of the Supreme Court of Oklahoma refers to several authorities, none of which we submit support the proposition there laid down.

Travis v. *Dickey,* 96 Okla. 256; 222 Pac. 527, after finding that the oil tank cars in question were so far as the record was concerned still in Oklahoma, holds that in the absence of proof of a taxable situs elsewhere than Oklahoma, the presumption was that the situs followed the domicile of the owner.

State v. *Timbrooks Estate,* 129 S. W. 1068. This related simply to the personal property of a decedent who died while a resident of a certain county in the State of Missouri and left a will. His executors immediately moved his personal property out of the county. A statute covered the situation, providing that the property should be taxed at the residence of the decedent, and the holding of the Missouri Court of Appeals was to sustain that statute. It is to be noted that the dispute was between two counties of the same state.

Gulf Refining v. *Tillinghast,* 94 So. 418. This also involved the validity of a statute which fixed the situs of

a certain railroad cars in the county of the domicile of the owner. Another locality disputed the statute and the court sustained it. It is to be noted that here the dispute was between municipalities of the same state.

Upon turning to the citation of 26 R. C. L. 273, we find nothing more than the statement of the general rule that the situs is presumed to be the domicile of the owner, in the absence of proof to the contrary. In paragraph 244 of the same volume, page 276, the same general principle is laid down as was found by this court in the Union Transit Company case.

Prairie Cattle Company v. *Williamson*, 5 Okla. 488; 49 Pac. 937.

This case involved a statute which undertook to tax cattle belonging to a nonresident when the cattle were found in the state. The Supreme Court of Oklahoma upheld the statute, but nowhere was it shown in that case that the cattle were any place else than the State of Oklahoma during the entire taxable period. On the contrary, the court particularly notes that the evidence showed that 600 head of cattle belonging to the company were upon an average for the year 1895 grazing in the township.

II.

THE CARS OF THE JOHNSON OIL REFINING COMPANY WERE IN FACT TAXED IN OTHER STATES. THE RULE OF THE OKLAHOMA COURT WOULD RESULT IN DUPLICATE TAXATION.

It is shown by the record the cars were taxed on an *ad valorem* basis in the states of Ohio, Michigan, Louisiana, Indiana, Georgia, West Virginia, Missouri, Kansas, North and South Dakota, Nebraska, Colorado, Iowa, Mississippi, and Arkansas (22-R, 25, 35; 24-R. 14, 15, 21).

Hence under the decisions of this court they were taxable in the states in which they were used in proportion to their use.

To accept the theory of the Oklahoma Supreme Court that because the cars always left and always were returned to one particular plant in Oklahoma, that plant was their taxable situs would deny to the other states the right to tax these cars to any extent whatsoever.

The problem of taxation of personal property, as this court has so frequently said is a purely practical one. Where it appears that personal property is regularly in and out of several states the practical question presented is the effect of those movements on the taxability of the property. On the one hand the movement cannot mean that it entirely deprives the states of the right of taxation. If so, the property would escape taxation altogether. On the other hand it certainly cannot mean taxation to the entire value of the property in every state. If so, we would have double, triple and quadruple taxation. The practical question, therefore, must have some practical answer, and that practical answer is taxation on an average basis. Hence the decisions of

American Ref. Co. v. *Hall*, 174 U. S. 70.
Union Ref. Co. v. *Lynch*, 177 U. S. 149.
Union Tank Line v. *Wright*, 249 U. S. 275.
Pullman Company v. *Penna*, 141 U. S. 18.

How can it be said that the right of other states to tax the cars of the Johnson Oil Company to the extent that they are used in those states can be denied on the simple theory that those cars had a base of operations in Oklahoma and always left from the same plant and were always returned to that plant? This fact has no part in the basic right of the several states to tax the cars in question.

III.

WHILE IT IS WITHIN THE POWER OF A STATE TO TAX CARS THAT MOVE IN AND OUT OF A STATE, PROVIDED A METHOD IS USED THAT REFLECTS TRULY THE JURISDICTIONAL FACTS, SUCH A TAX CANNOT BE IMPOSED IN THE ABSENCE OF AN ENABLING ACT OF THE LEGISLATURE FULLY DEFINING THE METHOD. AS THERE WAS NO SUCH STATUTE IN OKLAHOMA, NO TAX MAY BE IMPOSED BY THE TAXING AUTHORITIES OF THAT STATE ON THE CARS IN QUESTION.

In *Marye* v. *B. & O. R. R. Co.*, 127 U. S. 117, it was held that while it was competent for the State of Virginia to impose upon the movable personal property of the B. & O. Railroad Company, a corporation of Maryland, which is brought within the territory of Virginia "and there habitually used and employed, the same rate of taxation which is imposed upon similar property used in like way by its own citizens, it has not done so in the taxing laws of the state which were in force when the taxing controversy was imposed." And it was held that the taxation of such property could be enjoined as being beyond the authority of the state.

In *Tamble* v. *Pullman Co.*, 207 Fed. 30, it was held that a state has power to tax movable property of a foreign corporation brought into the state to be there so used and employed, and when such property is not continuously the same, but, as in case of cars, is constantly changing, it may fix the tax by an assessment on the average amount so used. It was held, however, that:

> "In order to exercise such power the state *must by appropriate legislation fix the taxable situs for such movable and changing property, and provide a method and basis for its assessment;* and this the State of Tennessee has not done with respect to passenger cars owned by nonresident corporations." (Italics ours.)

See, also:

State v. *Union Tank Line Co.*, 94 Minn. 320, 102 N. W. 721.

In the case last cited reference was made, in that connection to the case of *American Refrigerator Transit Company* v. *Hall*, 174 U. S. 70, and as to which the court said:

> "The decision is an interesting and important one on the subject of the taxation of the cars of corporations of the class to which the defendant belongs. But it is not relevant to the case at bar, for the obvious reason that we have *no statute* similar to the one involved in that case."

Of course, it will not be disputed that all tax exactions must rest upon legislative enactments, and that all taxing officials must keep strictly within their authority. In *In re Dodge Brothers*, 241 Mich. 665, 217 N. W. 777, 779, it was said:

> "Tax exactions property or excise, must rest upon legislative enactment, and collecting officers can only act within express authority conferred by law. Tax collectors must be able to point to such express authority so that it may be read when questioned in court. The scope of tax laws may not be extended by implication or forced construction. Such laws may be made plain, and the language thereof, if dubious, is not resolved against the taxpayer."

In *Avery* v. *Interstate Grocery Co.*, 118 Okla, 268, 248 Pac. 340, the court said:

> "Executive and ministerial officers must, in tax matters, keep strictly within the authority conferred."

In that case the court held that it was competent for the legislature to give commercial vehicles engaged in interstate commerce a *situs* in the state for the purpose of taxation, subject to constitutional and reasonable requirements, but as the legislature had not done so there existed no power to tax them.

Carlile v. *Pullman Palace Car Co.*, 8 Colo. 320, 7 Pac.

164, was a case in which the county authorities of Pueblo County, Colorado, attempted to assess certain sleeping cars of the Pullman Palace Car Company habitually coming into the county. The question decided was that no county in the state had authority to tax the cars, and if taxable at all, the tax could be imposed only by the state, acting through the state board of equalization.

There is no statute in Oklahoma under which a tax may be lawfully levied on these tank cars on an average basis.

Conclusion.

We respectfully submit that in view of these considerations the judgments of the Supreme Court of the State of Oklahoma in the three cases above captioned should be reversed.

Respectfully submitted,

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APPENDIX.

(Tax Ferret Law)

SEC. 9798. *"Contract and Compensation for Discovery.* The board of county commissioners of any county in this State may contract with any person or persons to assist the proper officers of the county in the discovery of property not listed and assessed, as required by existing laws, and fix the compensation at not to exceed fifteen per cent of the taxes recovered under this article. Before listing and assessing the property discovered, the county treasurer shall give the person in whose name it is proposed to assess the same, ten days' notice thereof by registered letter, addressed to him at his last known place of residence, fixing the time and place when objections in writing to such proposed listing and assesment may be made. An appeal may be taken to the county court for the final action of the treasurer within ten days, by giving notice thereof in writing and filing an appeal bond, as in cases appealed from the board of county commissioners to the district court."

SEC. 9799. *Appeal from County to Supreme Court.* Upon an appeal being taken to the county court as provided in section 9798, the county court shall give precedence to the same and shall try and determine the same within thirty days in the manner provided for trial of civil cases, except that no jury shall be allowed. Within sixty days from the final judgment of the county court, appeal may be taken by either party to the Supreme Court of the state as other appeals are taken."

(Compiled Oklahoma Statutes, 1921.)

SEC. 9966. *Appeals from County Board of Equalization—Procedure—Records.* Any taxpayer feeling aggrieved at the assessment as made by the assessor, or the equalization as made by the county board of equalization may, during the session of said board or if the same is closed, within ten days after the first Monday in June, file with said assessor as secretary of said board, a written complaint specifying his grievances and the pertinent facts in relation thereto in ordinary and concise language and without repetition, in such manner as to enable a person of common understanding to

know what is intended; and said board shall be authorized and empowered to take evidence pertinent to said complaint and for that purpose is authorized to compe' the attendance of witnesses and the production of books and papers by subpoena and to correct or adjust the same, as may seem just. And the stenographer of the county court is directed, at the request of the board, or taxpayer, to take shorthand notes of such testimony and to transcribe such complaint and evidence, and a full transcript of the action of the board thereof and file the same with his certificate as to its accuracy in the district court, the filing of which transcript shall complete said appeal which shall, in due course, be examined and reviewed by said court and affirmed, modified or annulled as justice shall demand. In any case where the county board of equalization shall increase the valuation of any property above the value returned by the assessor, the county assessor shall notify, by mail the person in whose name any such property is listed, giving the amount of such valuation as increased, and such person shall have ten days from the mailing of such notice in which to appeal from such valuation, and such notice shall state the limit of time for appeal."

(Compiled Oklahoma Statutes, 1921.)

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CHARLES ELMORE CR

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1933.

Nos. 22, 23, 24.

JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 22.**
JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 23.**
JOHNSON OIL REFINING COMPANY, *Appellant,* vs. **THE STATE OF OKLAHOMA, ex rel., C. E. MITCHELL,** County Attorney of Pawnee County, Oklahoma, et al., *Appellees.*	**No. 24.**

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF FOR THE APPELLANT.

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APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

REPLY BRIEF FOR THE APPELLANT.

It is contended by counsel for the appellee (see page 11) that the Supreme Court of Oklahoma has made a finding of fact that the actual situs of the cars in question was in Pawnee County, and from this assertion they

pass to the conclusion that there is no question of law involved to be reviewed by this court.

The judgment of the Supreme Court of Oklahoma was a conclusion of law upon the basic facts that are not in dispute. Such being the case, the doctrine often laid down by this court determines that contention against the appellees.

In *Old Dominion Steamship Company* v. *Virginia*, 198 U. S. 305, this court said, in speaking of a tax case appealed from the Supreme Court of Appeals of Virginia:

> "The facts being settled, the only question is one of law. Can Virginia legally subject these vessels to said taxation?"

Counsel cite no authority for their contention in this regard. We submit that the proposition laid down in the Old Dominion case above quoted is axiomatic and has been applied consistently both before and after that decision. Particularly we refer to the many tax cases which have come to this court where the same situation existed. Such cases we have cited in our brief in chief.

We wish also to direct this reply to the contention of counsel for appellee, which seems to be the crux of their position (see page 23 of their brief).

> "Tangible personal property is taxable:
>
> A. At domicile of owner, when no actual situs exists.
>
> B. At actual situs, when one exists.
>
> C. At wherever it may acquire a "fictitious situs," by virtue of reasonable legislative action.
>
> Obviously, the fiction represented by 'A' has no place when 'B' is present.
>
> * * * * * *
>
> But property may be taxable under 'A' or 'B' and at the same time several places, under 'C.'"

That is to say, the contention of counsel means that the entire fleet of cars for its entire value for the entire

period in question is taxable in Oklahoma because of the "actual situs" which they allege it has acquired in that State, and at the same time that it is taxable in any number of other States for the portion of that same tax period when the cars were in such States.

Nowhere do they define "actual situs" or refer to any authority giving the elements of a definition. They simply allege that these cars had an "actual situs" in Oklahoma even though it is admitted (page 3) that "they (the cars) are engaged in *principally* interstate commerce" (italics ours), and the statement of appellant is not denied that they are engaged in interstate commerce for 99 per cent of their use and were out of the State of Oklahoma for more than five-sixths of the time (24 Rec. 10, 11).

In their contention with reference to this so-called "actual situs" they point to the facts that the cars are always in transit (page 3), always routed to return to Oklahoma after they have been unloaded; that in Oklahoma there is a repair track for minor repairs (page 4); that their movements are largely directed from Oklahoma, and that when they come in to Oklahoma too fast for the demand they are stored on the tracks in Oklahoma.

From these facts they base a conclusion in the form of a question (page 18). "Are the cars temporarily in Pawnee County in transit a smaller part of the time, or do they have an actual situs in Pawnee County and are temporarily absent in transit a greater part of the time?" And they answer it in the affirmative (page 16) that the cars have in Oklahoma an actual situs, "regardless of temporary though *extended* absences from the State." (Italics ours.)

This narrow distinction puts the theory of taxation on a narrow unworkable base, and ignores the funda-

mental reason announced in all the cases, particularly the *Union Refrigerator Transit* case (199 U. S. 194), that taxation is a practical matter and relates directly to the protection that can be given to the property taxed by the State undertaking to tax it.

Counsel cite no authority for the proposition of law which they affirm, that the cars can be taxed in any number of different places. On the contrary this proposition is directly in conflict with principles laid down in the cases decided by this court. Of course it is true that there is nothing in the constitution against double taxation, but this court has said nevertheless that it will not adopt theories of taxation which will lead to highly undesirable and uneconomic results such as double taxation. This matter has received a very full consideration in several recent cases decided in this court.

In the case of *Safe Deposit & Trust Company* v. *Virginia*, 280 U. S. 90, involving personal property taxation on the corpus of a trust estate held in Maryland, the beneficiary living in Virginia, the court said with reference to the necessity of avoiding a theory which would lead to double taxation (pp. 92, 93):

> "Ordinarily this court recognizes that the fiction of *mobilia sequuntur personam* may be applied in order to determine the situs of intangible personal property for taxation. *Blodgett* v. *Silberman*, 277 U. S. 1. But the general rule must yield to established fact of legal ownership, actual presence and control elsewhere, and ought not to be applied if so to do would result in inescapable and patent injustice, whether through double taxation or otherwise." (p. 92.)
>
> * * * * * *
>
> "The adoption of a contrary rule would 'involve possibilities of an extremely serious character' by permitting double taxation, both unjust and oppressive." (p. 93.)

In the case of *Farmers Loan* v. *Minnesota*, 280 U. S. 204, involving an inheritance tax by Minnesota on the estate of a New York citizen with reference to bonds issued by various municipalities of Minnesota, this court said (p. 210):

> "Nor is it permissible broadly to say that notwithstanding the Fourteenth Amendment two States have power to tax the same personalty on different and inconsistent principles or that a State always may tax according to the fiction that in successions after death *mobilia sequuntur personam* and domicile govern the whole. *Union Refrig. Transit Co.* v. *Kentucky, supra; Rhode Island Trust Co.* v. *Doughton, supra,* and *Safe Deposit & Trust Co.* v. *Virginia, supra,* stand in opposition."
>
> "*Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, indicates plainly enough that the right of one State to tax may depend somewhat upon the power of another so to do. And *Coe* v. *Errol*, 116 U. S. 517, 524, though frequently cited to support the general affirmation that nothing in the Fourteenth Amendment prohibits double taxation, does not go so far. It affirmed the rather obvious proposition that the mere fact of taxation of tangibles by one State is not enough to exclude the right of another to tax them." (p. 211.)

Finally, in the case of *First National Bank* v. *Maine*, 284 U. S. 312, which involved the question of an inheritance tax on the estate of a resident of Massachusetts with reference to stock he owned in a Maine corporation, this court held that it could not be taxed in Maine, and said with reference to double taxation, as follows (p. 322):

> "The rule of immunity from taxation by more than one state, deducible from the decisions in respect of these various and distinct kinds of property is broader than the applications thus far made of it. In its application to death taxes, the rule rests for its justification upon the fundamental conception that the transmission from the dead to the living

of a particular thing, whether corporeal or incorporeal, is an event which cannot take place in two or more states at one and the same time. In respect of tangible property, the opposite view must be rejected as connoting a physical impossibility; in the case of intangible property, it must be rejected as involving an inherent and logical self-contradiction. Due regard for the processes of correct thinking compels the conclusion that a determination fixing the local situs of a thing for the purpose of transferring it in one state, carries with it an implicit denial that there is a local situs in another state for the purpose of transferring the same thing there. The contrary conclusion as to intangible property has led to nothing but confusion and injustice by bringing about the anomalous and grossly unfair result that one kind of personal property cannot, for the purpose of imposing a transfer tax, be within the jurisdiction of more than one state at the same time, while another kind, quite as much within the protecting reach of the Fourteenth Amendment, may be, at the same moment, within the taxable jurisdiction of as many as four states, and by each subjected to a tax upon its transfer by death, an event which takes place, and in the nature of things can take place, in one of the states only." (pp. 326-327.)

* * * * * *

"We conclude that shares of stock, like the other intangibles, constitutionally can be subjected to a death transfer tax by one state only." (p. 328.)

We submit that personal property can no more have a double situs for the purpose of personal property taxation than it can for purpose of inheritance taxation. The above cases should preclude an application of any theory which gives to the property a situs in two different States at the same identical time for taxation in both places. On the other hand, the theory expressed in the cases cited in our brief in chief at page 23 provide for taxation by each State on a proportionate basis for the period that the cars may be within the State, and subject to its protection.

The above cases clearly demonstrate that intangibles can only be taxed at one place, so what possible basis of distinction is there for holding that movable tangibles are not to be treated in the same way, and that they can be taxed in two States. On the contrary, as we have shown from the *Union Refrigerator Transit* case (199 U. S. 194), this court refused to permit movable tangibles, such as cars, to be taxed both in the domicile of the owner and in the various States where the cars were located from time to time. The same principle was held by the Supreme Court of Illinois in a case very similar to the case at bar. *Keith Ry. Eq. Co.* v. *Board of Review,* 283 Ill. 244, 119 N. E. 302. If double taxation is not permitted with reference to the domicile and the States where the cars may happen to be, what ground is there for holding as counsel has urged that double taxation is permitted in the case of "actual situs," as they use the term, and in the States into which they may move.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. [redacted] 22

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET. AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

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Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 843

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

The appellee, in support of its assertion of belief that there exists in the above entitled case no grounds

of jurisdiction for review by this court, and also for grounds of dismissal, respectfully represents:

Jurisdiction of review is sought to be established by appellant, on the grounds of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344), quoted under "A" of appellant's statement, as follows:

> "* * * Where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Oklahoma Statute asserted (under "B" of appellant's statement) to have been drawn in question on the ground of its being repugnant to the Constitution of the United States is Section 9574, Compiled Oklahoma Statutes of 1921, which reads as follows:

> "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

Relief under Section 237 of the Judicial Code is sought upon the theory, as set out on pages six and seven of appellant's statement, that this Court will accept the interpretation placed upon the Oklahoma statute by the Supreme Court of Oklahoma; and that the Supreme Court of the State of Oklahoma has interpreted Section 9574, C. O. S. 1921, in such a manner as to make it contravene the 14th Amendment of the

Constitution of the United States; thus giving this Court jurisdiction.

Under this doctrine, this Court is asked to "read into the Statute" the interpretation of the Oklahoma Supreme Court:

> Citing *Knights of Pythias* v. *Meyer*, 264 U. S. 30; *Appleby* v. *New York*, 271 U. S. 364; *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494; *Alabama Railway Co.* v. *Kentucky*, 274 U. S. 76, and other cases referred to but not discussed.

Under the cases cited by appellant to the effect that this Court will accept the State court's interpretation of a State statute, it is apparent that this Court will look only to that interpretation, as shown by the decision of the State court.

Inasmuch as this Court will not, for purposes of determining jurisdiction, review the State court's determination as to the *facts* in the case, a review of contentions in the State court as to the facts has no place in this statement.

The Supreme Court of Oklahoma, in its decision of December 20, which is set out in full, attached hereto, marked Exhibit "A", after reciting that no *ad valorem* tax was paid on the cars in Illinois, the domicile of the Company, uses the following language:

> "Section 9574, C. O. S. 1921 (C. O. S. 1931, Sec. 12317), provides:
>
> " 'All property in this state, whether real or personal, including the property of corpora-

tions, banks and bankers, except such as is exempt, shall be subject to taxation.'

"A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

"The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation owns but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky,* 96 Ok. 256, 222 Pac. 527. *State* v. *Timbrook's Est.*, (La.) 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Okla. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref.* v. *Co.* v. *Tillinghast,* (Mo. App.) 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute 'property within the State'. They are merely temporarily absent at times from Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars is taxable in Pawnee County. *Prairie Cattle Co.* v. *Williamson,* 5 Ok. 488, 49 Pa. 937."

In holding no cars taxable in Osage County, the Court further said:

> "In our opinion these cars did not have a permanent abiding place within Osage County, and were not subject to taxation otherwise than in Pawnee County."

As we conceive it, the above is the interpretation to which this Court will look.

The Supreme Court of Oklahoma interprets Section 9574, C. O. S. 1921, to tax property which has an actual situs, a permanent abiding place, within the State.

In the language of this Court in *Coe* v. *Errol, infra;* in considering the right of a State to subject to taxation all personal property having an actual situs within its borders, "It is hardly necessary to cite authorities on a point so elementary."

> "The right of the State, in which personal property is situated, to tax it, is not affected by the fact that the owner resides in another State, which taxes him for the same property as a part of his general estate attached to his person. *Coe* v. *Errol*, 116 U. S. 517."

To the same effect:

Pullman Palace Car Co. v. *Pennsylvania,* 141 U. S. 18.

St. Louis v. *Wiggins Ferry Co.,* 11 Wall. 423.

Savings & Loan Soc. v. *Multnomah County,* 169 U. S. 421.

Frick v. *Pennsylvania,* 268 U. S. 473.

The Supreme Court of Oklahoma found the actual situs to be in Pawnee County and the property, for that reason, there taxable in accordance with Sect. 9574, C. O. S. 1921. Surely this Court will not, in considering jurisdiction, go behind that finding of fact on the part of the State Court.

> "As to whether a tax is in accordance with a law of a State, the decision of the highest Court of a State is conclusive." *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 23.
>
> "We said in *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 451, 33 Sup. Ct. 329, 57 L. Ed. 591, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See, also, *Foreman* v. *Meyer,* 227 U. S. 452, 33 Sup. Ct. 331, 57 L. Ed. 594. If there be no dispute about the facts, *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state." *Ireland* v. *Woods,* 246 U. S. 323.

The appellant's contention of the uncontitutionality of Section 9574, C. O. S. 1921, was not urged upon the Trial Court nor upon the State Supreme Court.

WHEREFORE, for the reasons afore set forth, appellee respectfully moves the court to dismiss this appeal for lack of jurisdiction.

J. BERRY KING,
Attorney General of the State of Oklahoma.
F. M. DUDLEY,
Assistant Attorney General.
W. T. CLEETON,
County Attorney of Pawnee County, State of Oklahoma.
ED. WAITE CLARK,
Special Counsel.

EXHIBIT "A."

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 23218.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23219

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23342.

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY.

Error from the District Court of Pawnee County, State of Oklahoma.

Honorable Thurman S. Hurst, Judge.

Reversed and Remanded.

No. 23334.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Osage County, State of Oklahoma.

Honorable Henry Wood, Judge.

Reversed.

SYLLABUS.

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed. Waite Clark, P. E. Rowe, R. K. Robertson for Pawnee County.

C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull for Johnson Oil Refining Company.

RILEY, *J.*:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferret. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in interstate and intrastate commerce. By the use of them the Johnson Oil Refinery Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This ac-

commodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seems to be the result of sales contracts made from the office at Chicago. O. C. Goward is the superintendent of transportation for the refinery, whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs. They are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no *ad valorem* tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S. 1921, provides:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that

despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky*, 96 Okla. 256, 222 P. 527; *State* v. *Timbrook's Est.*, 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast*, 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. *Williamson* v. *Prairie Cattle Co.*, 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage

County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage County and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J., Herner, Cullison, Swindall, McNeill, Kornegay, JJ. concur.

Lester, C. J., Andrews, J., absent.

This opinion, together with dissenting opinion of Swindall, J., on rehearing, not here attached, not yet officially reported, but reported in 19 Pacific, 2d Series, page 168.

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IN THE SUPREME COURT OF THE UNITED STATES.

October Term, 1933.

Nos. 22, 23, 24

JOHNSON OIL REFINING COMPANY, *Appellant,*

No. *vs.* 22

THE STATE OF OKLAHOMA, *EX REL.* C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, *ET AL., Appellees;*

JOHNSON OIL REFINING COMPANY, *Appellant,*

No. *vs.* 23

THE STATE OF OKLAHOMA, *EX REL.* C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, *ET AL., Appellees;*

JOHNSON OIL REFINING COMPANY, *Appellant,*

No. *vs.* 24

THE STATE OF OKLAHOMA, *EX REL.* C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, *ET AL., Appellees.*

Appeal From the Supreme Court of the State of Oklahoma.

BRIEF FOR THE APPELLEE.

Due to the fact that the issues are identical in cases Nos. 22, 23 and 24, October, 1933, term, appellants have submitted but one brief and argument. We trust that one answer brief will suffice. Record references are to case No. 22, unless otherwise stated.

Statement.

Appellant's statement as to the origin of these cases is essentially correct.

Facts.

As will be pointed out later, this appeal is one involving the proper determination of a question of fact, to-wit: "Does the actual situs of the tank cars in question exist in Pawnee County, Oklahoma?" The principal witness of the State of Oklahoma, in these hearings was Mr. G. C. Lilly (R. 10), Secretary and Treasurer of Johnson Oil Refining Company.

Mr. Lilly (No. 22, R. 10) (No. 24, R. 12) and Mr. George A. Mindeman, Traffic Manager of Johnson Oil Refining Company (No. 22, R. 37) and (No. 24, R. 23) are the principal witnesses for the Johnson Company. So we find the state depending upon the officers of the defendant company for its evidence. We feel that such favorable testimony as we developed from these gentlemen, should be given full credit, it being in a manner of admission.

We do not feel that a fair statement of the facts can be compiled by gathering the conclusions of these witnesses most favorable to the taxpayer. While we are not bound by each separate statement of the testimony of Mr. Lilly, merely because he is our witness, we state that we have confidence in his, and in Mr. Mindeman's *statements of fact* (as distinguished of course from their *conclusions* based upon their theory of the lawsuit).

We shall set forth the facts as we conceive them, together with record references; and shall later discuss in detail the testimony wherefrom appellant's and our versions differ.

These tank cars are owned and operated in their business, by the Johnson Company. They are engaged in (principally) interstate commerce, in transporting refined petroleum products from the Johnson Company's refinery at Cleveland, Oklahoma, to such points as the purchasers of their product direct. The cars are "very infrequently" (Mr. Lilly, Rec. 31) and "at very rare instances" (Mr. Lilly, No. 24, Rec. 18) used in connection with an oil plant Johnson Company owns in Illinois. They are also "sometimes" used to get products from other refineries (No. 24, R. 10). The cars may enter any state in the Union, and frequently enter the following named states: Arkansas, Colorado, Kansas, Michigan, Mississippi, Nebraska, Louisiana, Ohio, South Dakota, Wisconsin, Maryland, Iowa, Missouri, Illinois.

The cars were stenciled "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma (No. 24, R. 18), or "Johnson Oil Refining Company, Cleveland, Oklahoma" (R. 32). Empties were always returned to Cleveland, unless diverted by special order (R. 13) (No. 24, R. 19). All cars are sent out with billings to return to the plant at Cleveland (R. 35) (No. 24, R. 19). All railroads handling said cars are instructed to return them to Cleveland, unless otherwise specifically directed (No. 24, R. 10).

At Cleveland, the company has repair trackage to accommodate 12 to 15 cars (R. 30), and maintains there a stock of such replacements and materials for repairs as can be utilized outside of a railroad shop (No. 24, R. 10). Cleveland is the only place the company has for the repair of its cars, such other repairs being done by the American Tank Car Company in one of its shops. The Cleveland office has authority to purchase repairs for replenishing the stock there (No. 24, R. 10). When cars are repaired by Johnson Oil Company, it is done at Cleveland (No. 24, R. 10).

When a car in transit needs repairs, the railroad company handling the car makes the necessary repairs, sends the bill to the Cleveland office for approval or disapproval, and if it is approved, it is transmitted to the Chicago office for payment, and check is mailed to the Cleveland office for distribution; or directly to the concern furnishing the material or labor (No. 24, R. 11).

The company has, besides the repair trackage, trackage at Cleveland of a capacity of about 67 cars (R. 13, 38 and 23). In returning to Cleveland to be reloaded, the empty cars remain on said tracks from twenty-four hours to ten days, depending on the season of the year and the volume of products handled (No. 24, R. 10 and 13). They are on the tracks for *reloading* purposes twenty-four hours (No. 24, R. 13).

The company has unloading trackage at several points, but no trackage whatever in Chicago (R. 13). Cleveland is the one and only place where the company always has use for the cars (R. 36). Each car comes regularly to Cleve-

land. Cleveland is the only place to which each car goes (No. 24, R. 19).

Appellant says (page 7 of brief) that none of the cars are allocated or set aside to the refinery, citing No. 24, record, page 68. It is true that Mr. Lilly so testified in the *Osage County* case, which was not appealed. Pawnee County was not a party to that case, so had no opportunity of cross examination. However, it seems obvious that the statement was a mere conclusion of the witness, because Mr. Lilly's testimony (R. 32), and the stipulation (No. 24, R. 10) is to the effect that *all* cars were billed out to be returned to Cleveland, and bore painted direction on the cars to return to Cleveland, all railroads handling said cars are instructed to return these cars, when empty, to Cleveland, Oklahoma, unless specifically directed by the Johnson Company to send elsewhere (No. 24, R. 10), clearly shows that as a matter of fact *all* the cars were allocated, or set aside to the Cleveland Refinery. There is nothing in the record concerning the custom of oil companies in allocating cars to different refineries. (Pawnee County had no way of anticipating what issues would be raised in the *Osage County* case, and no way of clearing up this mis-statement, had it known of it.) If the court will not take judicial knowledge of the meaning of the term, in the oil industry, we suggest that counsel for appellant be asked. What is meant by allocating certain cars to a certain refinery is merely that those cars are to operate from that refinery; and to return to that refinery when empty.

The statement is made on page 8 of their brief that the "cars are used in appellant's business whenever needed, and their movements are directed from the Chicago office of the company", citing page 23 of the record. It is true that Mr. Lilly, during his examination conducted by the appellant's attorneys did state:

Q. "And from where are the movements of these cars directed?

A. Chicago, Illinois.";

and at another place Mr. Lilly testified (R. 28):

Q. "Have they (Cleveland office) anything to do with the control of the cars?

A. No."

However, Mr. Lilly testified that the statement in the Railroad Guide to "send movements and mileage to O. C. Goward, Superintendent of Transportation, Cleveland, Oklahoma", was correct, and the further statement: "Send bills for repairs to cars and make remittances to the Johnson Oil Refining Company, Cleveland, Oklahoma," correctly stated the orders of the company, except as to remittances.

The fact that, according to Mr. Lilly's testimony the cars were dead-headed back to Cleveland, there to be received, loaded, billed and sent out to a new destination within twenty-four hours, makes ridiculous the statement that the Cleveland office "had no control over the cars", and that "their movements are directed from the Chicago office of the company."

Mr. Mindeman, Johnson Company's Traffic Manager, (No. 24, R. 23) who, having been employed in that line of work for thirteen years, doubtless understands the language, testified, as a witness for Johnson Company (No. 24, R. 24) as follows:

Q. "Now, the cars that you have on your trackage are under your direct supervision and control at Cleveland?

A. At Cleveland, yes.

Q. So far as routing is concerned?

A. That is right."

Mr. Mindeman further testified that empties are stored at Osage and Parsons, by the railroad company when they come back too fast to be accommodated by the Johnson Company's trackage at Cleveland, and that when Johnson Company wants more cars, the railroad sends them in from the side tracks at Osage and Parsons, and elsewhere (No. 24, R. 24). That if the Johnson Company had sufficient trackage, they would have the cars brought on and stored there at Cleveland instead of on the railroad company's tracks at Osage, so they would be ready for use when needed (No. 24, R. 25). That they call the railroad company every day and tell them how many cars they want *each day* (No. 24, R. 25).

On page 8 the statement is made "The cars that do come to the state, come for the sole purpose of receiving refinery products to be shipped out of the state. The time necessary to load a car is about twenty-four hours."

That statement intimates that not all cars come into

the state. The following testimony by Mr. Lilly shows the unfairness of the intimation (R. 13):

Q. "Is it a fact that all of the cars owned by the Johnson Company come into Pawnee County sometime during the year?

Mr. Davidson: You mean all or each one?

Mr. Clark: Each one.

A. Yes, sir, I am sure they do."

And, on page 31:

Q. "And they all return to Cleveland?

A. Yes, sir."

As to their coming for the sole purpose of getting a load of products, as will be discussed later, they come back to Cleveland, not to get a load for any particular destination, but to be at Cleveland to take out such load as might await their return, or might be ordered while they were on the sidetrack there.

Whether the Johnson Company considers them an investment of its marketing business, or of its refinery, is a matter of bookkeeping, and in any event immaterial; because, as will be pointed out later, it is the theory of the state that the cars would be taxable in Pawnee County even were they owned by a separate corporation (all other facts being the same of course).

Much is said about the fact that the Johnson Company was in the marketing business before it purchased the refinery. This, too, is immaterial. However, the impression that the Cleveland refinery is merely a side issue, is dissipated by the testimony of Mr. Lilly, as follows (R. 12):

Q. (Mr. Clark:) "When would you say the Johnson Oil Refining Company bought these cars?

A. The first twenty cars we owned, we bought in 1918. *We acquired seventy more with the purchase of this plant* in 1922, *and immediately thereafter, bought the remainder of this fleet of cars.*"

It is true that Mr. Lilly testifies (R. 34) that they have "never stored any cars, they are always in use." However, he testifies that they have, besides their repair trackage, trackage at Cleveland of a capacity of about sixty-seven cars (R. 13), and that the empty cars remain on said tracks for twenty-four hours to ten days, depending on the demand; are on the tracks for *reloading* purposes twenty-four hours (No. 24, R. 13) and that cars are left on the railroad company's sidetracks because the Cleveland tracks would not accommodate all of them.

Summary of Argument.

It is true that no state has the power to tax tangible personal property which lies wholly without its territorial limits; and an attempt to do so would be a violation of the Fourteenth Amendment to the Constitution of the United States.

To extend that rule to apply to property not wholly without the limits of the state; but having an actual situs within the state, and merely temporarily absent most of the time, does violence to the reasoning upon which the rule is based, and has no justification.

ARGUMENT.

I.

The Supreme Court of Oklahoma in the decision there recognizes the well established rule that no state can tax tangible property which exists wholly without the limits of its territory.

Appellant says (brief, p. 13) that that court seeks to distinguish between, *first*, cars in and out of the state indiscriminately (such as railroad rolling stock), and used without reference to one particular base of operations, and, *second*, cars which are in and out of the state, but used in reference to one particular base of operation. The decision above referred to is short. We are tempted to set it out in full. A reading of that decision shows that the distinction appellant attempts to say is the criterion upon which the Supreme Court based its decision is entirely the child of counsel's imagination. There is no intimation in the Supreme Court of Oklahoma's opinion that they made such a distinction. In fact, such an issue is entirely foreign to the questions involved; and was at no time during the previous proceedings even hinted.

What the Oklahoma Supreme Court decided was simply this: That under the facts as established by the evidence in the case, including the fact that the cars were operated out of Cleveland, the *actual situs* of these cars was in Pawnee County, Oklahoma. There was no need for the Oklahoma Supreme Court, and there is no need for us to "dis-

tinguish" this case from any decision by this court, because it has always been the law, as laid down by this court, that the state of *actual situs* has the power to tax.

The issue in this case has from the beginning been: Does the maxim, *mobilia sequuntur personam* apply, so as to make the cars taxable at Chicago, the domicile of the owner, or has an *actual situs* been established in Pawnee County, and so removed them from that fiction?

We feel that there is no question of law involved herein. We feel that this court would reverse this case only by deciding that the Oklahoma Supreme Court, the trial court, and the county treasurer, erred in their finding of fact to the effect that the *actual situs* of the cars was in Pawnee County.

This court has repeatedly recognized three kinds of situs of tangible personal property. *First, actual situs,* where taxation of the property is a matter of right, just as is the taxation of real estate. *Second, "fictitious" or "legislative" situs,* wherein the legislature says in effect, that "property having a situs elsewhere, but which comes into our state, shall pay taxes in proportion to the protection we afford them." *Third,* the maxim, *mobilia sequuntur personam,* that the property follows the owner, is a form of judicial fictitious situs, recognized as a means of preventing the escape of personal property from taxation, and not as a means of evading taxation, as it has at times been used.

This court has always exercised a zealous supervision over the enforcement of *fictitious situs,* to prevent unreasonable taxing laws which would amount to confiscation.

But we have been unable to find a single case by this court, or by any inferior court, which questions the right of a state to tax property having an *actual situs* there.

Appellant fails, or refuses, to distinguish between *actual* and *fictitious situs;* and cites numerous cases on *fictitious situs,* as authority for holding that the State of Oklahoma has no right to tax these cars. Were this case based upon a *fictitious situs,* they would be in point. But the Supreme Court of Oklahoma and the lower courts based their judgment that the cars were taxable upon the existence of an *actual situs.*

Appellant has insisted through this litigation that no actual situs has been acquired to remove the cars for the maxim to the effect that the property follows the owner; and that the cars have a taxable situs in Illinois, by reason of that being the domicile of the company.

While the State of Oklahoma insists that an *actual situs* exists in Pawnee County, that the maxim, *mobilia sequuntur personam,* does not apply, and that Illinois not only does not collect ad valorem taxes on the cars, nor any tax whatever for that matter, except their corporation tax, but that Illinois does not attempt to, or claim the right to so tax them; and under the *Union Refrigeration Transit* case, *infra,* probably could not tax them, on an ad valorem basis.

Mr. Lilly testified (Rec. 31): "That Illinois would allow a deduction of the valuation of the cars from their capital stock tax, were the taxes paid on the cars in Oklahoma." In this connection, it may be proper to call the court's attention to the fact that the Oklahoma statutes provide that

the taxpayer list his property. So there has been no laches on the part of the state in not assessing the cars sooner.

The Union Refrigeration Transit Company v. *Kentucky*, 199 U. S. 194, is much cited in appellant's brief. In that case, the State of Kentucky attempted to tax personal property belonging to a domestic corporation, although the property was *wholly outside* of the state. This court in that case practically repudiated the doctrine of "*mobilia sequuntur personam,*" so far as it relates to tangible property.

The meat of that decision is discernible from the following quotation:

> "The power of taxation, indispensable to the existence of every civilized government, is exercised upon the assumption of an equivalent rendered to the taxpayer in the protection of his person and property, in adding to the value of such property, or in the creation and maintenance of public conveniences in which he shares—such, for instance, as roads, bridges, sidewalks, pavements, and schools for the education of his children. If the taxing power be in no position to render these services, or otherwise to benefit the person or property taxed, and such property be wholly within the taxing power of another state, to which it may be said to owe an allegiance, and to which it looks for protection, the taxation of such property within the domicile of the owner partakes rather of the nature of an extortion than a tax, and has been repeatedly held by this court to be beyond the power of the legislature, and a taking of property without due process of law. * * *
>
> "But, notwithstanding the rule of uniformity, lying at the basis of every just system of taxation, there

are doubtless many individual cases where the weight of a tax falls unequally upon the owners of the property taxed. This is almost unavoidable under every system of direct taxation. But the tax is not rendered illegal by such discrimination. Thus, every citizen is bound to pay his proportion of a school tax, though he have no children; of a police tax, though he have no buildings or personal property to be guarded; or of a road tax, though he never uses the road. In other words, a general tax cannot be dissected to show that, as to certain constituent parts, the taxpayer receives no benefit. Even in case of special assessments imposed for the improvement of property within certain limits, the fact that it is extremely doubtful whether a particular lot can receive any benefit from the improvement does not invalidate the tax with respect to such lot. *Kelly* v. *Pittsburgh*, 104 U. S. 78, 26 L. ed. 658; *Amesbury Nail Factory Co.* v. *Weed*, 17 Mass. 53; *Thomas* v. *Gay*, 169 U. S. 264, 42 L. ed. 740, 18 Sup. Ct. Rep. 340; *Louisville & N. R. Co.* v. *Barber Asphalt Paving Co.*, 197 U. S. 430, 49 L. ed. 819, 25 Sup. Ct. Rep. 466. Subject to these individual exceptions, the rule is that in classifying property for taxation, some benefit to the property taxed is a controlling consideration, and a plain abuse of this power will sometimes justify a judicial interference. *Norwood* v. *Baker*, 172 U. S. 269, 43 L. ed. 443, 19 Sup. Ct. Rep. 187. It is often said protection and payment of taxes are correlative obligations."

The above case would be in point were Illinois trying to tax these cars; or were Oklahoma trying to tax cars which never come into the state. But appellant says that if a tax on property wholly without the state, and therefore not receiving any protection from the state is void, then a tax on property which does not remain in the state *all the time*,

and thus getting protection from the state only a part of the time, is void. The last above quoted paragraph of the *Union Refrigeration Transit Company* case clearly shows the fallacy of this argument.

While it is true that the "protection doctrine" is invoked to gauge the reasonableness of taxation by *legislative or fictitious situs*, and is given as one reason for denying the right to tax property wholly outside the jurisdiction of the state, it seems obvious that under these decisions there is no suggestion that the *amount* of protection is the criterion of the existence of an *actual situs*.

In *Gromer* v. *Standard Dredging Company*, 224 U. S. 361, 56 L. ed. 801, in passing on a claim that the taxing government could afford no benefit to the property, this court held:

> "If Porto Rico had jurisdiction over the harbor area, it had jurisdiction to tax property which was situated in the harbor, no matter how engaged; and being so situated, the validity of the tax upon it cannot be determined by an inquiry of the extent it may be benefited."

Citing *Thomas* v. *Gay*, 162 U. S. 264.

On pages 16-17 of brief, counsel comments on the fact that the Oklahoma Supreme Court "seeks to obviate its (the *Union Refrigeration* case) effect by drawing the distinction above referred to, as follows:" It seems obvious to us, and evidently did to the court, that their decision that the *actual situs* existed in Pawnee County made any "distinction" unnecessary, because the *Union Refrigeration* case was nowise in point.

On page 17, as well as on page 13, of their brief (as before pointed out) appellant attempts to foist upon the Oklahoma Supreme Court, and upon the State of Oklahoma, a theory entirely foreign to our contention, a theory nowhere in evidence, in either the opinion above referred to, or in our exertions in behalf of the state; a theory for the first time called to our attention in their brief.

Our theory, as adopted by the courts, is merely that the *facts* bring this case within the well established rule, that a state may tax property having an *actual situs* therein, regardless of temporary (though extended) absences from the state. It is our theory, in this court, that if there is any basis for the finding of *actual situs,* this court never has, and will not now question the right of the state to tax the property.

The distinctions between taxation of intangible and tangible property is so manifest, from even a casual examination of the cases, and so extensive, that we do not feel it necessary nor proper to go into a dissertation on the subject. Suffice to say, the portion of *First National Bank* v. *Maine,* quoted on page 20 of appellant's brief, does not, in connection with the *Union Transit* case, or any other case, justify the conclusion that "tangible personal property such as freight cars traveling in and out of many states, could not possibly acquire an *actual situs* in one state * * * because of the simple fact that they were operating out of one plant in one of the states, instead of indiscriminately." That may or may not be true. Certainly the distinction is obvious (in determining *actual situs)* between these cars which are used

exclusively in the "marketing business" of the company, and railroad freight cars which travel hither and yon, and are in the possession of, and in the use of, other railroad companies (who pay rent on them), sometimes for months, or even years, at a time. That class of freight cars usually has no situs because in transit all the time. They just "wander" from one railroad company to the next, and are used indiscriminately by whoever comes into possession of them.

Neither are ships similar to cars, as to actual situs. In the *Pullman Palace Car Company* v. *Commonwealth of Pennsylvania,* 35 L. ed. 673, this court distinguishes between ships and land transportation.

The Oklahoma Supreme Court is criticized for the citation of cases "none of which we (appellants) submit support the proposition there laid down."

What proposition? The theory suddenly attributed to the Supreme Court, by the appellant? Or the "proposition there laid down" that the creation of an actual situs supercedes the old maxim *mobilia sequuntur personam*? Such was the holding of the cited cases of *Travis* v. *Dickey; State* v. *Timbrooks Estate;* and *Gulf Refining* v. *Tillinghast,* as could be ascertained by reading the cases rather than analyzing from the syllabi.

We insist upon the privilege of retaining the theory upon which the state commenced these proceedings, to-wit: That the facts surrounding these cars established an *actual situs* in Pawnee County, which nullifies the antiquated maxim of *mobilia sequuntur personam,* and makes the cars taxable in Pawnee County. That was the issue all along, the

cases were tried on that issue, and that is still the issue which must be decided in the adjudication of this appeal.

Untfl the filing of the appellant's brief, and their attempt therein to assign us a new and surprise theory, the question had concededly been this:

Are the cars temporarily in Pawnee County, in transit, a smaller part of the time, or do they have an actual situs in Pawnee County, and are temporarily absent, in transit, a greater part of the time.

We can conceive of only two views this court could possibly take, in reversing this case, to-wit:

1st. That as a matter of arbitrary law, no actual situs can exist on movable tangible property which makes trips outside of territorial border of the state.

2nd. That the facts surrounding these cars are insufficient to justify the lower courts in saying that the *actual situs* existed in Pawnee County.

As to the *first proposition:* Just as well contend that a man cannot have a *residence* in a county, if he is ever away from it.

Nowhere do we find a decision of any court holding temporary absence divests personal property of its *situs.* Certainly if these cars were only out of Pawnee County, one day, each year, that temporary absence would not prevent, as a matter of law, taxation based upon the *actual situs.* Neither would absence for two days, each year. Would thirty days, or ninety days, or six months' absence

destroy the situs? We say that movable tangible personal property may be in the state three hundred sixty days a year under certain circumstances, and have no actual situs. And it may be absent three hundred sixty days, and have an actual situs. Certainly there is no justification, no legal authority for the position that temporary absence for more than half the time destroys the situs. The amount of time actually spent in the state is merely a matter to consider along with other circumstances, in arriving at a conclusion as to the existence of actual situs.

As to the *second proposition:* This proposition constitutes the issues upon which these cases were tried. Narrowed down, it comes to this quetsion: Are the cars merely temporarily in the state, in transit, for the purpose of getting a load of petroleum products, or are they "a part of the mass of property within the state," and are merely temporarily absent from the state, in transit, for the purpose of delivering a load of products?

Appellant insists that the cars are in Pawnee County only while in transit. In other words an empty car arriving at Cleveland is in transit.

Vol. 4, page 3485, Words and Phrases, first series, defines "In Transit," as follows:

> "'In transit', mean literally in course of passing from one point to another, and such is its common acceptation."

Citing:

Amory Mfg. Co. v. *Gulf C. & S. F. Ry. Co.*, 37 S. W. 857;

Gulf C. & S. F. Ry. Co. v. *Pepperell Mfg. Co.*, 37 S. W. 965 (see 115 S. W. 117).

The cases cited by appellant in its brief in the Supreme Court of Oklahoma, in relation to the *Osage County* cases, not involved in this appeal, interpret the term, "in transit," to mean "in the course of passage from one point to another."

Indeed, the case of *Royal Insurance Co.* v. *Texas Railroad Co.*, 115 S. W. 117, held that an insurance policy covering cotton while in depot or on grounds adjoining depot, but not while *in transit* on *open cars*, is liable for loss of cotton which had been loaded on an *open car* preparatory to shipment, because it was not *in transit*. Under such a rule of law, the tank cars are not in transit even after the Cleveland office loads them and selects their destination, until they are delivered to the railroad company.

In any event, empty cars arriving at Cleveland are not passing to any designated point beyond Cleveland, that being their only known destination; and they are not in transit.

When the cars are shipped from Cleveland they are *in transit* from the time they leave the refinery, while on their way to the point of discharge, while unloading, and on their way back until they arrive again at the refinery. Then, upon their arrival at the refinery, they are no longer in transit, but are at rest until they start again, for the very simple reason that they are not "going any place." Except while the cars are at rest on the refinery tracks at Cleveland, they are *all of them, all the time,* in transit, *going to Cleveland,*

either directly, when empty, or by way of the unloading point, when loaded.

II.

The statement is made (p. 22 of brief) that these cars were taxed on an *ad valorem* basis in several other states (not including Illinois however), citing record 22, pages 23, 35; record 24, pages 14, 15 and 23.

In passing, it is only fair to explain that this taxation on the "ad valorem" basis as Mr. Lilly calls it, upon which taxes were paid on these cars is not a tax upon any specific car, but is based upon the average number of cars within the state, *computed on the mileage traveled.* In other words, these other states have created a *"fictitious situs"*, for cars which pass through the state in transit (R. 24, pp. 14-15). It is true that taxation at the *actual situs,* and again in states through which the cars pass *in transit,* results in *duplicate taxation.* But appellants fail to cite cases wherein the assessment of taxes by means of a *fictitious situs,* deprives the state of actual situs of its power to tax. No ad valorem tax is paid in Illinois. *No other state than Oklahoma* claims the *actual situs* of these cars. And no tax whatever is paid on these cars in Oklahoma.

Appellant offers no authority for the statement on page 23 of brief, that the taxation of the cars in Pawnee County as the place of *actual situs* would deprive the "other states of the right to tax these cars to any extent whatever." Such is not conceivably the result of taxation of the cars at the place of *actual situs;* any more than is the con-

verse true, that collection of a tax ~~passed~~ based on a *"fictitious situs"* by states through which the cars pass in transit, deprives the state of *actual situs,* of its right of taxation. Neither has the slightest effect upon the other. The cases cited on page 23 merely hold that taxation may be based upon a *"fictitious situs."*

Even were ad valorem taxes paid in Illinois, as the domicile of the company, it would not defeat taxation at the place of *actual situs;* much less would taxation by other states, on a *fictitious situs* do so:

> "The right of the state, in which personal property is situated, to tax it, is not affected by the fact that the owner resides in another state, which taxes him for the same property as a part of his general estate attached to his person."
>
> —*Coe* v. *Errol,* 116 U. S. 517, 6 Sup. Ct. 475, 29 L. ed. 715.

Tank cars are just one of the class of personal property which, by reason of moving from one state to another, has to pay more taxes than if they stayed at home. Like trucks, busses, and grazing cattle.

III.

This portion of appellant's brief is dedicated to a discussion of *legislative or fictitious situs.* It has no place in this case. We claim the cars taxable, and the Oklahoma Supreme Court held them taxable, because their actual situs was in Oklahoma. Just as farm implements, stocks of merchandise, livestock or office furniture belonging to a non-

resident and having an *actual situs* in Oklahoma, are taxable there.

Nothing is taxable (at least in Oklahoma) except by statute; and the statute quoted by the Oklahoma Supreme Court is our general taxing statute. Its reference to "property in the state" is interpreted by the Supreme Court as meaning property having an *actual situs* in the state. The court expressly said (R. 52):

> "A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made."
>
> "* * * When this property is away from that point it is in transit; but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner." (Here citing cases holding existence of actual situs to take property out of the rule of *mobilia sequuntur personam.*) (This is the citation criticized on page 21 of appellant's brief.)
>
> "* * * In our opinion these cars did not have a permanent abiding place in Osage County, and were not subject to taxation elsewhere than Pawnee County."

IV.

We have done our best in following the brief of the appellant, taking up the divisions I, II, III in their argument in that order. Now, after answering the brief of appellant, we beg to submit our theory of the case.

Tangible personal property is taxable:

A. At domicile of owner, when no *actual situs* exists.

B. At actual situs, when one exists.

C. At wherever it may acquire a "fictitious situs," by virtue of reasonable legislative action.

Obviously, the fiction represented by "A" has no place when "B" is present.

> "This doctrine is not allowed to stand in the way of the taxing power in the locality where the property has its actual situs, and the requisite legislative jurisdiction exists."
>
> —*City of St. Louis* v. *Wiggins Ferry Co.*, 78 U. S. 416, 20 L. ed. 194.

But property may be taxable under "A" or "B", and at the same time several places, under "C".

In this case, no claim of ability to tax under "C" is put forth by the State of Oklahoma, so it may be dismissed.

At the trial of these cases, as heretofore suggested, the oil company claimed that there was no *actual situs,* and the property was "taxable only at the domicile of its owner, to-wit, the State of Illinois," (quoted from paragraph #2 of Johnson's petition in error in the Supreme Court of Oklahoma in case No. 23342 (No. 24, R. 3)). (See also paragraph 7 of response filed in that case (No. 24, R. 8) and paragraph 2 of motion for new trial in other cases (R. 39).) They complained in paragraph 9 of motion for new trial, "because the court erred in holding and deciding that the evidence introduced was legally sufficient to overcome the presumption that the situs of the cars owned, employed and used by the Johnson Oil Refining Company in the conduct of its marketing business conducted by it in Illinois, and various

other states, was at its domicile in the State of Illinois, and in holding and deciding that the evidence introduced established a definite and exclusive situs for taxation of said cars in Pawnee County" (R. 41). The "objection to proposed assessment" (R. 5) set forth the claim that *mobilia sequuntur personam* controlled.

Points 3, 4, 5 and 6 of "Statement of Points Relied On" (R. 78) recognize the issue as *actual situs versus domiciliary situs.*

The judgment of the County Court (R. 42) and the judgment of the Supreme Court (R. 50) are plainly based upon the overcoming of the presumption of domiciliary situs by the existence of an actual situs. Nowhere, in the state's pleadings, nor in the decisions do we find any hint of claim of "*fictitious situs*", nor yet of the fantastic distinction appellant now seeks (on page 13 of brief, and indeed through the argument) to substitute as the contention of the state, and the basis of the decisions.

To review the findings of the state courts, we first inquire, just what is necessary to constitute *actual situs?* Quoting from taxpayer's brief in the Oklahoma Supreme Court, citing *Avery* v. *Interstate Grocery Co.*, 118 Okl. 268, quoting *Lathe* v. *Schoop*, 60 N. H. 34, 35:

> "Short stay of movables during their transit through a place is not, within its meaning but (referring to the tax law) in an ordinary sense movables are situated 'in a place where they are used day after day, where they are stored, housed or stabled when not in actual use, and where the business in which they are employed is done'."

Where are the cars involved herein, stored? Where is the business done? Where are they used from day to day?

As we understand it, the court will not weigh the evidence, but will accept the facts as found by the state court, where there is "sufficient evidence to support" the findings. *Egan* v. *Hart*, 165 U. S. 188; *Dover* v. *Richards*, 151 U. S. 658. While this case would seem to be one where such a rule is especially just, due to the fact the state had to use the defendant's officers as witnesses, we feel that a review of the evidence by this court could only result in affirmation of the state court's holding.

We say that the trial court was justified in holding the *actual situs*—the place where they were used day after day, where they were stored, housed or stabled when not in actual use, where the business in which they were employed was done—was in Pawnee County, due to the following facts:

The tank cars were stenciled, "Return to Johnson Oil Refining Company, Cleveland, Oklahoma"; they were always "dead-headed" back to Cleveland unless specifically diverted; all the cars came back to Cleveland, as a matter of course; Cleveland was the one and only place to which any individual car came regularly; the cars were stored there from twenty-four hours to ten days, awaiting loading which only takes twenty-four hours, the length of time stored depending on the demand; all returned cars would have been kept at the refinery if they had trackage; the Cleveland office had control of the cars, and decided which cars went to which destination; the only repair trackage

and the only supply of repair materials maintained by the company was at Cleveland; Cleveland was the place from which each car started, and the place to which each car returned; all cars were billed to return to Cleveland, except for infrequent diversions; all the cars were at all times, while in transit, en route to Cleveland, either directly as they returned from a delivery, or via their destination as they went on a delivery; the cars were in transit most of the time—and Cleveland is the only spot at which they were not in transit; they came to rest at Cleveland. They had no other actual situs, and pay no ad valorem tax in Illinois.

The business in which the cars were engaged was transportation of petroleum products. While the sale contracts were from the Chicago office, the transportation was conducted from Cleveland. The company had no trackage in Chicago, and no occasion to use the cars there.

The cars were used in Cleveland from day to day, several being loaded every day, and on the average of once and a half a month. They were stored in Cleveland when not in transit; repaired there. They were allocated to that refinery for an indefinite period, and certainly became a part of the mass of personal property of Pawnee County. No car had any special run. It might be stored there for indefinite periods, often for ten days when the demand was not great.

The Oklahoma Supreme Court specifically set out most of the above facts, as the basis for its finding that the *actual situs* is in Pawnee County, Oklahoma (R. 51).

Conclusion.

In conclusion, we call the court's attention to the rule that this court will indulge in every presumption in favor of the state's right to tax, and will interfere only when a clear and demonstrated usurpation of power exists. *Green v. Frazier*, 253 U. S. 233, 64 L. ed. 878.

We feel that the decision of the Oklahoma Supreme Court is justified by the facts and authorized by the law; is in no way repugnant to the Constitution of the United States, and should be affirmed.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES.

Nos. 22, 23 and 24.—October Term, 1933.

Johnson Oil Refining Company, Appellant,
22 *vs.*
The State of Oklahoma *ex rel.* C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al.

Johnson Oil Refining Company, Appellant,
23 *vs.*
The State of Oklahoma *ex rel.* C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al.

Johnson Oil Refining Company, Appellant,
24 *vs.*
The State of Oklahoma *ex rel.* C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al.

Appeals from the Supreme Court of the State of Oklahoma.

[December 4, 1933.]

Mr. Chief Justice Hughes delivered the opinion of the Court.

These cases present the question of the validity of property taxes laid in Pawnee County, Oklahoma, under the state statute, upon the entire fleet of appellant's tank cars. The challenge in each case was under the due process clause of the Fourteenth Amendment of the Federal Constitution upon the ground that the cars did not have their situs within the State and hence that the State had no jurisdiction to tax them. The taxes in Nos. 22 and 23 were on 380 cars for the years 1925 to 1928; in No. 24, on 381 cars for the year 1931. The assessments in Nos. 22 and 23 were made by the county treasurer and upheld by the County Court. In No. 24 the assessment was made by the local board of equalization and was reduced by the District Court of the County to an assessment on 64 cars, which that Court held to be the average number present in the County on any one day during the year. The three cases (with a fourth, which is not before us, from another County) were consolidated for hearing on appeal in the Supreme Court of Oklahoma. That Court sustained the assessments on the entire fleet of cars, thus affirming the judgment of

the County Court and reversing the judgment of the District Court. 162 Okla. 185. The cases come here on appeal.

Appellant, Johnson Oil Refining Company, is an Illinois corporation having its principal office in Chicago, and its refinery at Cleveland in Pawnee County, Oklahoma. The Supreme Court of the State reached the conclusion that all the cars had their "taxable situs" at the latter place. As the asserted federal right turns upon the determination of the question of situs, it is our province to analyze the facts in order to apply the law, and thus to ascertain whether the conclusion of the State Court has adequate support in the evidence. *Beidler* v. *South Carolina Tax Commission*, 282 U. S. 1, 8.[1]

The essential facts are not in dispute. The tank cars are operated in transporting refined products from appellant's factory at Cleveland, Oklahoma, to various points of delivery throughout a large part of the United States. They are almost exclusively engaged in interstate commerce. They are very infrequently used in connection with an oil plant appellant owns in Illinois. They are sometimes loaded at refineries located in States other than Oklahoma. The cars are stenciled "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma", or "Johnson Refining Company, Cleveland, Oklahoma", and with each shipment go instructions to return the car to Cleveland. The cars are thus billed back to Cleveland unless ordered to another point. At that place appellant has repair trackage which can accommodate from 12 to 15 cars for minor repairs and maintains such a stock of materials as can be utilized for repairs outside of a railroad shop. Besides the above-mentioned repair trackage, appellant has trackage at Cleveland with a capacity for about 67 cars.

The cars are almost continuously in movement. Returning to Cleveland to be reloaded, the cars remain on the tracks from twenty-four hours to ten days depending on the season of the year and the volume of products handled. They are on the tracks for reloading purposes twenty-four hours. Each of the cars makes about one and one-half trips every thirty days, that is,

[1] Kansas City Southern Railway Co. *v.* Albers Commission Co., 223 U. S. 573, 591-593; Creswill *v.* Knights of Pythias, 225 U. S. 246, 261; Northern Pacific Railway Co. *v.* North Dakota, 236 U. S. 585, 593; First National Bank *v.* Hartford, 273 U. S. 548, 552, 553; Fiske *v.* Kansas, 274 U. S. 380, 385, 386; Ancient Egyptian Order *v.* Michaux, 279 U. S. 737, 745; Sterling *v.* Constantin, 287 U. S. 378, 398.

"each car is loaded at the Cleveland refinery, sent to the point of delivery, returns to the Cleveland plant, is reloaded and sent out again to a point of delivery each thirty days." Each car is outside of Pawnee County and the State of Oklahoma from twenty to twenty-nine days out of each month. It was variously estimated at the trial in No. 22 that the daily average number of cars in Pawnee County during the years 1925 to 1928 was between 37 and 66. The agreed statement of facts in No. 24 states that that daily average during the years 1929 and 1930 was 64; that is, about 16 per cent of the cars owned by appellant were in Pawnee County and about 84 per cent, on a daily average, were "somewhere in transit outside" of that County.

Although rolling stock, such as these cars, is employed in interstate commerce, that fact does not make it immune from a nondiscriminatory property tax in a State which can be deemed to have jurisdiction. *Maryе* v. *Baltimore and Ohio R. R. Co.*, 127 U. S. 117, 123; *Pullman's Car Co.* v. *Pennsylvania*, 141 U. S. 18, 23; *American Refrigerator Transit Co.* v. *Hall*, 174 U. S. 70, 82; *Union Refrigerator Transit Co.* v. *Lynch*, 177 U. S. 149, 152; *Union Tank Line Co.* v. *Wright*, 249 U. S. 275, 282. Appellant had its domicile in Illinois and that State had jurisdiction to tax appellant's personal property which had not acquired an actual situs elsewhere. "The State of origin remains the permanent situs of the property notwithstanding its occasional excursions to foreign parts". See *New York Central R. R. Co.* v. *Miller*, 202 U. S. 584, 597; *Southern Pacific Co.* v. *Kentucky*, 222 U. S. 63, 69. But the State of the domicile has no jurisdiction to tax personal property where its actual situs is in another State. *Union Refrigerator Transit Co.* v. *Kentucky*, 199 U. S. 194, 209, 211; *Western Union Telegraph Co.* v. *Kansas*, 216 U. S. 1, 38; *Frick* v. *Pennsylvania*, 268 U. S. 473, 489. While, in this instance, it cannot be doubted that the cars in question had acquired an actual situs outside the State of Illinois, the mere fact that appellant had its refinery in Oklahoma would not necessarily fix the situs of the entire fleet of cars in that State. The jurisdiction of Oklahoma to tax property of this description must be determined on a basis which is consistent with the like jurisdiction of other States.

The basis of the jurisdiction is the habitual employment of the property within the State. By virtue of that employment the property should bear its fair share of the burdens of taxation to which other property within the State is subject. When a fleet of cars

is habitually employed in several States—the individual cars constantly running in and out of each State—it cannot be said that any one of the States is entitled to tax the entire number of cars regardless of their use in the other States. When individual items of rolling stock are not continuously the same but are constantly changing, as the nature of their use requires, this Court has held that a State may fix the tax by reference to the average number of cars found to be habitually within its limits. *Marye* v. *Baltimore and Ohio R. R. Co., supra.* This principle has had frequent illustration. It was thus stated in *American Refrigerator Transit Co.* v. *Hall, supra*: "It having been settled, as we have seen, that where a corporation of one State brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing, according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed". See, also, *Union Refrigerator Transit Co.* v. *Lynch, supra; Union Refrigerator Transit Co.* v. *Kentucky, supra; Germania Refining Co.* v. *Auditor General,* 184 Mich. 618, affirmed, 245 U. S. 632; *Union Tank Line Co.* v. *Wright, supra.*

Applying these principles, no ground appears for the taxation of all the cars of the appellant in Oklahoma. It is true that the cars went out from and returned to Oklahoma, being loaded and reloaded at the refinery, but they also entered and were employed in other States where the oil was delivered. Oklahoma was entitled to tax its proper share of the property employed in the course of business which these records disclose, and this amount could be determined by taking the number of cars which on the average were found to be physically present within the State.

The judgments of the Supreme Court of Oklahoma are reversed and the causes are remanded for further proceedings not inconsistent with this opinion.

It is so ordered.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 23

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

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the situs of said property was established by such evidence to be in Pawnee County, Oklahoma, and not elsewhere, and to which ruling said Johnson Oil Refining Company excepted.

4. The court erred in refusing to sustain the objection of Johnson Oil Refining Company to the proposed assessment of its cars as a taking of its property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The court erred in not holding and deciding that the property assessed was taxable only at the domicile of its owner.

6. The judgment of the County Court of Pawnee County is not supoorted by the evidence, which wholly fails to show that the cars of the Johnson Oil Refining Company, or any of said cars, were located and had an actual situs, in Pawnee County on January 1st, 1928.

7. The conclusion and judgment of the court that the tank cars of the Johnson Oil Refining Company were subject to [fol. 3] taxation in the State of Oklahoma, is contrary to law, in that said cars were, as shown by the evidence, property beyond the territorial jurisdiction of the State, and that such judgment, assessment and taxation constitutes a taking of the property of Johnson Oil Refining Company without due process of law, hence in violation of the Fourteenth Amendment to the Constitution of the United States.

8. The judgment of the Court is contrary to the undisputed evidence, which established that the cars assessed were the property of a non-resident corporation, domiciled in the State of Illinois, used and employed by it in the transportation of merchandise in interstate commerce, and in the course of its marketing business conducted by, and from, its office in the State of Illinois, and were only temporarily in Pawnee County, and in the State of Oklahoma, on such business, and had no abiding place therein.

9. The judgment of the Court is contrary to law because the proof showed that the cars assessed for taxation were only temporarily in the State of Oklahoma, and upon interstate business, there being no statute of the State fixing a situs for such cars, or any portion thereof, in Pawnee County or in said state.

10. The court erred in the construction of the statute of Oklahoma providing for taxation of all real and personal property in the State, and in holding and adjudging that the cars of Johnson Oil Refining Company were property in the State of Oklahoma within the meaning of said stat-
[fol. 4] ute, which said construction of the statute would render the same unconstitutional in that it would impute to the Legislature an intent to tax a non-resident's property outside the jurisdiction of the State, and in disobedience to the due process clause of the Fourteenth Amendment to the Constitution of the United States.

11. The judgment of the court is contrary to law, as neither the State of Oklahoma, as such, nor any of its political subdivisions or taxing districts, has the power or authority to tax the cars of Johnson Oil Refining Company, or any of them, and which cars were shown by the evidence to be only temporarily in the State, and for a purpose wholly inconsistent with an indefinite stay therein, to-wit, for receiving an interstate load of refinery products, remaining in said state for such purpose not more than twenty-four hours at a time, and coming into the state approximately only eighteen times, or eighteen days, in the course of one year, and consequently were constantly out of the state for the remaining 347 days of the year, and the imposition of such tax is therefore without authority of law, and amounts to the taking of the property of Johnson Oil Refining Company without due process of law, and in violation of the Fourteenth Amendment to the Constitution of the United States.

12. The court erred in overruling the motion of Johnson Oil Refining Company for a new trial, and in refusing to grant it a new trial upon the grounds therein set forth.

[fol. 5] Wherefore Johnson Oil Refining Company prays that said judgment be reversed, and that it be restored to all things it has lost by reason thereof.

Charles Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, Attorneys for Johnson Oil Refining Company.

[fols. 6 & 7] EXHIBIT "A"

IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

Case-made—Filed Dec. 19, 1931; filed in Supreme Court Dec. 24, 1931

[File endorsements omitted.]

[fol. 8] Be it remembered that heretofore certain proceedings were had before the County Treasurer of Pawnee County, Oklahoma, a transcript of which proceedings is in words and figures as follows, to-wit:

[fol. 9] Transcript of Proceedings Before the County Treasurer of Pawnee County, Oklahoma in the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

NOTICE OF PROPOSED ASSESSMENT

Office of the County Treasurer of Pawnee County, Oklahoma

Dated March 13th, 1930.

To Johnson Oil Refining Company, Cleveland, Oklahoma:

You are hereby notified that information has been filed by the tax ferret of said county with me as county treasurer of said county, that you were the owner of property which had a taxable situs in said county, of the description, and of the fair cash value, and for the tax years, as is more particularly stated in the notice to me, a copy of which is hereto attached for your information and as part hereof, which property it is declared has been omitted from assessment and taxation in said county.

The law required me to give you this notice by registered mail, and I have fixed the 8th day of April, 1930, at the hour of ten o'clock A. M., as the time and place at or

before which you may file written objections to said proposed assessment; at said time and place, or as soon there-
[fols. 10–17] after as may be convenient said matter will be given due legal consideration.

If no written objections be filed by you at or before said time fixed, it will be assumed that said proposed assessment is agreeable to you, and said proposed assessment will be made against you in accordance with said notice to me.

Respectfully, Chas. P. Livesay, as County Treasurer of said County.

P. S.—Any discussion of said matter, before hearing at the time and place above mentioned, with a view to amicable adjustment, should be had with the tax ferret. If and when such adjustments are reported to me, I will give them due consideration. I have no office to perform in this matter except to give it proper and judicial consideration in the proper way. No discussion of the matter with the ferret will excuse your filing written objections, if you do object. All payments on assessments should be made at my office to me or my deputies.

—— ——, County Treasurer.

[fol. 18] Before County Treasurer of Pawnee County, Oklahoma

No. —

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

Objections to Proposed Assessment—Filed April 8, 1930

The undersigned, Johnson Oil Refining Company, in response to the notice directed to it by the Treasurer of Pawnee County, Oklahoma, objects to the proposed assessment of its property for the years specified in said notice for the following reasons:

I

Because neither the tax ferret nor the County Treasurer of Pawnee County discovered that the said Johnson Oil Refining Company had omitted to list for taxation the property mentioned.

II

Because Johnson Oil Refining Company is a foreign corporation, incorporated under the laws of the State of Illinois, and domiciled in that state, and is engaged in inter-state commerce and the property so proposed to be assessed is used in inter-state commerce and is taxable at the domicile of said Johnson Oil Refining Company, or under the laws of the state wherever it may be used or located at the tax paying period.

III

Because the property proposed to be assessed was not domiciled in the State of Oklahoma and had no taxable situs in Pawnee County at the time mentioned in said notice.

[fol. 19]

IV

Because said cars are not of the value upon which the assessment is proposed to be made.

Wherefore Johnson Oil Refining Company prays that its objections be considered and that such proposed assessment be disallowed and denied and that proceedings herein be dismissed.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull, Its Attorneys.

[fols. 20–32] Before County Treasurer of Pawnee County, Oklahoma

No.—

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of Johnson Oil Refining Company

Order of County Treasurer—Filed May 8, 1930

The above entitled cause came on to be heard by the County Treasurer of Pawnee County on this the 8th day of May, 1930, upon the notice of the proposed assessment

against Johnson Oil Refining Company and its objections thereto. And the treasurer having heard the same:

It is ordered, considered, and adjudged by the County Treasurer that the said Johnson Oil Refining Company is a foreign corporation doing business in Oklahoma, and that on the 1st day of January, 1928, it had property in Pawnee County which was taxable therein and which was omitted from taxation, and that said property was of the fair cash value of Two Hundred Sixty-seven Thousand, Four Hundred ($267,400.00) Dollars.

It is therefore ordered that there be spread upon the tax rolls of Pawnee County, against said Johnson Oil Refining Company an assessment for and as of January 1, 1928, in the said sum of $266,700.00 to which order said Johnson Oil Refining Company objects and excepts and gives notice of its intention to appeal therefrom to the County Court of Pawnee County.

(Signed) Chas. P. Livesay, County Treasurer of Pawnee County, Oklahoma.

[fol. 33] In County Court of Pawnee County

No. 1805

In the Matter of Assessment Against Johnson Oil Refining Company, Cleveland, Oklahoma, of Alleged Omitted Property for the Year, 1928

Order Continuing Cause—Oct. 15, 1931

And now on this 15th day of October, 1931, cause continued to November 9, 1931, at 9 o'clock A. M. Attorneys for the State are the County Attorney and R. K. Robertson. For the defense are McCollum and McCollum of Pawnee, Oklahoma, and West, Gibson, Sherman, Davidson & Hull of Tulsa, Oklahoma.

[fol. 34] In County Court of Pawnee County

Statement of Evidence

Be it further remembered that thereafter, to-wit, on the 9th of November, 1931, said cause coming on for trial in

said County Court, at which time there appeared for Pawnee County, C. E. Mitchell, County Attorney of Pawnee County, Ed Waite Clark and R. K. Robertson, special counsel, and for Johnson Oil Refining Company, McCollum & McCollum and West, Gibson, Sherman, Davidson & Hull, and, both parties announcing ready for trial, the following proceedings were had, to-wit:

It was stipulated that, for the purposes of trial, this cause and cause No. 1741 might be heard together and upon the same evidence as they involve the same questions, and that separate judgments should be rendered in each case upon the evidence and which should be considered the evidence in each case.

STATEMENT OF COUNSEL

By the Court: Make your statements.

Mr. Davidson: The position of Johnson Oil Refining Company in its opposition to the proposed assessment, and the facts upon which it is based, can be briefly stated.

The Company, prior to March of this year, was an Illinois corporation, domiciled in that state and with its principal office in Chicago. For many years it has been engaged in the marketing and sale of refinery products. That business is interstate in its character, in that it sells and transports such products to consignees in many different states. Its tank cars have always been employed in that business, and were so employed long before it owned a refinery. The refinery at Cleveland was purchased late in 1922 to supply [fol. 35] merchandise for its marketing business, and since that time its cars have been in constant use in the business, substantially all of them being used in transporting the products of the refinery to points outside of Oklahoma, although not exclusively so, as the cars are also used to transport refinery products purchased from other refineries. But these cars are not necessary to the operation of the plant; they are not a part of the plant, nor a plant facility. If a facility at all, they are a facility of the company's marketing business.

The cars are loaded at the refinery upon the company's private tracks, and which operation takes about twenty-four hours. When unloaded at the destination in some other state they are dead-headed back to the refinery at

Cleveland for another load, unless diverted to some other destination. The interstate trip takes about twenty days on an average, so that no individual car is in Oklahoma, or in Pawnee County longer than about eighteen days in all, out of any year.

The company pays taxes on its refinery and its equipment in Pawnee County, where it is located. It also pays taxes on these cars and other property in Illinois, under the capital stock tax of that state, receiving credit for taxes paid elsewhere.

We are not objecting to an assessment of the cars merely because they are used in interstate commerce, for we do not contend that that necessarily exempts them from taxation, but upon the ground that the cars are not property within the state of Oklahoma; that they have no taxable situs in the state, either in fact, or by virtue of any legislative enactment, and that to tax them as proposed, or any number of them, would be to deprive Johnson Oil Refining Company of its property without compensation, and amount to a taking of its property without due process of law, and in violation [fol. 36] of the Fourteenth Amendment to the Constitution of the United States.

Stipulation as to Certain Facts

It is stipulated by the Johnson Oil Refining Company, and the State of Oklahoma, that the tank cars listed in the tax ferret's notice to the treasurer in the above styled causes were not specifically listed for assessment and taxation on an ad valorem basis in Pawnee County, Oklahoma, for the years as set out in said notices, 1920 to 1928 inclusive.

It is further stipulated that the Johnson Oil Refining Company's refinery and its equipment was assessed and taxed for the years 1923, to 1928, inclusive, as set out in the list and that tank cars were not included in the list.

It is further stipulated that the refinery referred to is situated in Pawnee County, Oklahoma, and it is further stipulated that Johnson Oil Refining Company was during all the years mentioned a foreign corporation and had its domicile in Illinois.

And thereupon the following testimony was introduced on behalf of the State of Oklahoma:

The Court: Call your first witness:

G. C. LILLY, called as a witness on behalf of the State, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by Ed Waite Clark and testified as follows:

[fol. 37] Direct examination.

By Mr. Clark:

Q. State your name.
A. G. C. Lilly.
Q. Where do you live?
A. 200 Wood Court, Wilmette, Illinois.
Q. That is a suburb of Chicago, Illinois?
A. Yes, sir.
Q. What is your business, Mr. Lilly?
A. I am employed by the Johnson Oil Refining Company, Secretary and Treasurer.
Q. Where does the refinery company have its office, general office?
A. 178 West Adams Street, Chicago, Illinois.
Q. Are you employed in that office?
A. Accounting department.
Q. Is that a foreign corporation?
A. Yes, sir.
Q. Licensed to do business in Oklahoma?
A. Yes, sir.
Q. Mr. Lilly, do you know, does the Johnson Oil Refining Company own any tank cars?
A. Yes, sir.
Q. Do you know how many?
A. At the present time, three hundred eighty-six.
Q. Do you know how many the Johnson Oil Refining Company owned on the first of January, nineteen hundred twenty-eight?
[fol. 38] A. I can't give you the exact number without referring to records, but the number hasn't varied very much in several years.
Q. The number hasn't varied much in several years?
A. No.

Q. Do you have the records with you showing how many tank cars they owned?

A. No, I have not.

Q. When would you say the Johnson Oil Refining Company bought these cars?

A. The first twenty cars we owned were purchased in 1918. We acquired seventy more cars with the purchase of this plant in 1922, and immediately thereafter, bought the remainder of this fleet of cars.

Q. So from that time on, it would be about three hundred eighty cars that the Johnson Oil Refinery owned?

A. About.

Q. Mr. Lilly, for what were these cars used?

A. For the transportation of their refinery products, gasoline, kerosene, from Cleveland, Oklahoma, and elsewhere for marketing purposes, to Iowa, Illinois and Missouri, and other states.

Q. And from where else?

A. From the plant of any manufacturer from whom we bought.

Q. You purchased other products than what you produced?

A. Yes, sir.

Q. You own the refinery at Cleveland?

A. Yes, sir.

Q. And is Cleveland the chief shipping point for that refinery?

A. Yes, sir.

Q. Do you know whether these cars have marked on them: "When empty return to Cleveland, Oklahoma"?

[fol. 39] A. I don't know that they are, at one time I believe they had the name "Cleveland, Oklahoma," stenciled on them.

Q. Now then I have here Railroad Guide, Equipment Guide, for January, 1928. Under the Johnson Oil Refining Company it has this statement: "Send movements and mileage to V. C. Goward, Superintendent Transportation, Cleveland, Oklahoma," and, also the statement: "Send bills for repairs to cars and make remittances to the Johnson Oil Refining Company, Cleveland, Oklahoma." Do you know whether your company authorized those two statements?

A. I do not.

Q. As a matter of fact, is it true that those are the orders?

A. Except as to the remittances. I don't think ever authorized anyone to send remittances to Cleveland, Oklahoma.

Q. But you did for mileage, etc.?

A. Yes, sir.

Q. How much trackage does the Johnson Oil Refining Company own in Chicago?

A. None.

Q. Do they own trackage in Cleveland?

A. Yes, sir.

Q. When the Johnson Oil Refining cars are unloaded and empty, is it not a fact that they are returned to Cleveland, Oklahoma?

A. Yes, sir, it is.

Q. All of them, unless there are special orders?

A. Yes, sir.

Q. Do you know, Mr. Lilly, the amount of trackage that the Johnson Oil Company has in Cleveland?

[fol. 40] A. I think we have sixty-seven spots there.

Q. That is room for sixty-seven cars on your trackage there?

A. Yes, sir.

Q. Does your company own any other refinery besides the one located at Cleveland, Oklahoma?

A. No.

Q. Is it a fact that all of the cars owned by the Johnson Refining Company come into Pawnee County sometime during the year?

Mr. Davidson: You mean all or each one?

Mr. Clark: Each one.

A. Yes, sir, I am sure they do.

Mr. Clark: I believe that is all.

Cross-examination.

By Mr. Davidson:

Q. How long do these stay at Cleveland?

A. Average of twenty-four hours per car.

Q. Then where do they go?

A. To whatever destination they are loaded for, in other states principally.

Q. Can you tell, Mr. Lilly, how long it takes on an average, for a car to make a trip, a round trip?

A. I think we have about one and a half car loadings per month. Twenty days per car.

Q. Twenty days to the car?

A. Yes, sir.

Q. You mean that the car is outside of Oklahoma twenty [fol. 41] days out of the month and that it is in Pawnee County about twenty-four hours of the time?

A. Yes.

Mr. Davidson: That is all.—I don't know that I put my question right. It takes a car about twenty days to make a round trip?

A. Yes.

Q. And a car is in Oklahoma then about one and a half times a month?

A. Yes, sir.

Q. That would make it thirty-six hours out of the month that any particular car is in the County?

A. Yes, sir.

Mr. Davidson: That is all.

Redirect examination.

By Mr. Clark:

Q. As I understand it, they load these cars at Cleveland and send them out and when they are empty, they ship them back to Cleveland?

A. Yes, sir.

By Mr. Rowe:

Q. In other words, when a car reaches a point of destination after it is delivered of its products, then it is returned to Cleveland?

A. Yes, sir, unless diverted. If material is purchased from other refineries.

Q. Then it is diverted?

A. No, it would go out with a bill of lading.

[fols. 42–44] Q. Otherwise it would return to Cleveland?

A. Yes, sir.

Mr. Rowe: That is all.

Mr. Clark: That is all.

Mr. Davidson: That is all.

[fol. 45] G. C. LILLY (recalled).

By Mr. Clark:

Q. You are the same Mr. Lilly that testified here awhile ago?

A. Yes, sir.

Q. Mr. Lilly do you know whether the Johnson Oil Refining Company ever paid to the State a tax on these cars prior to the Travis vs. Dickey case in which the cars would not come under the Public Carrier's Statute?

A. I cannot answer, I do not know anything about the Travis vs. Dickey case.

Q. Well, do you know whether the Johnson Oil Refining [fols. 46–48] Company ever paid any taxes in the State of Oklahoma under the Public Carrier's Statute?

A. Yes, sir.

Q. And how long did they pay that tax?

A. I think for four or five years.

Q. And when was the last time they paid that?

A. I am unable to say definitely without having opportunity to examine records, but it was the year prior to the year these cases were started. That was the last time we paid this tax to the State of Oklahoma.

Q. And since then you have not paid the State of Oklahoma any tax?

A. No.

Mr. Clark: That is all.

[fol. 49] G. B. STALLARD

Direct examination.

Mr. Clarke:

Q. State your name.

A. G. B. Stallard.

Q. Where do you reside?

A. Parsons, Kansas.

Q. Are you employed by the M-K-T Railroad Company?

A. Yes.

Q. In what capacity?

A. As chief Per Diem Clerk.

Q. That is in the Car Accounting Department?

A. Yes.

Q. What are your duties, Mr. Stallard, as to keeping the record of the cars?

A. Supervision.

Q. Do you have under your supervision record of the cars of the Johnson Oil Refining Company which are shipped on your railroad?

A. Yes.

Q. For what years?

A. We have now 1925 to date.

Q. That is, 1925 to 1929, inclusive?

A. Yes.

Q. Have you from these records compiled a statement as to the average number of cars belonging to the Johnson Oil Refining Company handled in Pawnee County, Oklahoma, [fol. 50] from 1925 to 1929 inclusive?

A. The statement was compiled under my direct supervision.

Q. Do you know that the statement is correct?

A. Yes.

Q. What was the average number of cars handled in Pawnee County during those years? The purpose of the question is to advise the Court of the average number of cars handled in Pawnee County in the event it should be decided to be the basis of taxation.

Objection.

Mr. Davidson: To which question the Johnson Oil Refining Company objects on the grounds that the question is incompetent, irrelevant and immaterial, and there is no power in Pawnee County to tax the cars on such basis.

The Court: Overruled.

Mr. Davidson: Exception.

A. During the year 1925 there was an average of 58.6 cars handled in Pawnee County; in 1926, 50.3; in 1927, 54.4; in 1928, 57.6; and in 1929, 66.7 cars.

Q. Mr. Stallard, how did you arrive at those figures as to the average?

A. By taking an inventory on different dates during the month and striking an average of the number of cars.

Q. Do you have under your supervision books which

show the location of the various cars on your line on each day of each month?

A. I have.

Q. You arrived at this average through tabulation of the cars of the Johnson Oil Refining Company in Pawnee [fol. 51] County on each of the respective days of the year as shown by those records? Is that correct?

A. Not each day; on certain dates.

Q. What dates did you use?

A. The 1st and 15th of each month.

Q. Then, as I understand it, Mr. Stallard, you arrived at this average by taking the number of Johnson Oil Refining Company cars in Pawnee County on the 1st and 15th of each month during the year?

A. Yes.

Q. Is that the basis of computation customarily used by the Railway Companies in determining the location of their cars?

A. Yes.

Q. And it is considered accurate?

A. Yes.

[fol. 52] Cross-examination.

By Mr. Davidson:

Q. These cars to which you have referred are cars which your records show reached Pawnee County?

A. Yes.

Q. Do you know whether these cars had been delivered to the Johnson Oil Refining Company at the refinery?

A. I did not.

Q. You don't know whether the cars, then, were on the Katy track in possession or control of the Katy or whether they had been delivered across the switch to the private [fols. 53–56] tracks of the Johnson Oil Refining Company?

A. I do not.

Redirect:

Q. Your records show that the cars had been returned to Cleveland, Oklahoma?

A. To Cleveland, yes.

[fol. 57] G. C. LILLY, being recalled, in open court deposes and says:

Direct examination.

By Mr. Clark:

Q. You are the same Mr. Lilly that testified here awhile ago?

A. I am.

Q. Mr. Lilly did you send in a statement purported to be a Return of Personal Property of Johnson Oil Refining Company, Pawnee County, Oklahoma, as of January 1, 1931?

A. Yes, I signed it and sent it in.

Q. And did you list in that assessment some tank cars?

A. Yes, sir.

Q. Are these tank cars a part of the fleet that this case involves?

A. Yes, sir.

Q. What did you list them at?

A. Five Hundred Dollars each.

Q. Now is a part of your work to make out assessments for the Johnson Oil Refining Company?

A. Yes, sir.

Q. Mr. Lilly, during the years that you have testified [fol. 58] that the Johnson Oil Refining Company owned this fleet of cars, what is the value of these cars, do they depreciate in value?

A. I think they have been depreciating in value ever since we have owned them.

Mr. Clark: That is all.

Cross-examination.

By Mr. Davidson:

Q. Mr. Lilly, on whose advice did you make that return?

A. Mr. C. E. Dacies, Assessor of Pawnee County, Oklahoma.

Q. Isn't it a fact that you had been advised that a compromise and settlement of all these tax ferret cases had been suggested and was agreeable to the County Officers, but had

not been consented to by the tax ferret, and that you were advised in order to show your good faith and good faith of the company in suggesting a compromise that you made this return, and that was the sole purpose and object of making the return?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial as to what he was advised and who advised, and not binding on this case.

The Court: You gave that valuation and swore to it, didn't you?

A. Yes, sir.

Q. Was it not your information that a part of that settlement of Five Hundred Dollars was for all these years?

Mr. Clark: We object to that as incompetent, irrelevant [fol. 59] and immaterial.

By Mr. McCollum:

Q. It isn't so much the value but the fact that they are listed at all, brought out by this negotiation.

A. I swore that was the value in the return suggested to me by the County Assessor.

By Mr. Davidson:

Q. Do you know the value?

A. No.

Mr. Clark: We offer this in evidence. (To stenographer: "Mark this 'State's Exhibit A' in both cases.")

Mr. McCollum: We want to object to all this testimony relative to the listing of sixty-four cars in the 1931 return, or any other number of cars, and ask that all that testimony be stricken for the reason that it is incompetent, irrelevant and immaterial, and not binding on the company in this proceeding, not making this motion and not asking that the testimony exclusive of these cars be stricken.

The Court: Objection be sustained.

Mr. Clark: Exception.

By Mr. Clark:

Q. Mr. Lilly, handing you that which we have marked "State's Exhibit A", for the purpose of identification, is [fol. 60] that the statement that you made and signed?

A. Yes.

The Court: Any objection?

Mr. McCollum: We object to it as incompetent, irrelevant and immaterial, and particularly object to that part which pertains to the sixty-four cars.

The Court: The objection will be sustained as to the value based on the sixty-four cars.

(Which said Exhibit "A" so offered and admitted in evidence by the State is hereinafter set out in full at page —.)

Mr. Rowe: Object to that.

The Court: Overruled.

Mr. Rowe: Exception.

Mr. Clark: State rests.

(Witness excused.)

DEMURRER TO EVIDENCE

Mr. Davidson: Now, at the close of the evidence for the County, comes the Johnson Oil Refining Company and demurs to the evidence on the grounds that it is wholly insufficient under the law to sustain a judgment of this Court for the assessment and taxation by Pawnee County of these tank cars.

The Court: We will adjourn until nine o'clock in the morning. We cannot finish this argument tonight so we will adjourn until tomorrow morning at nine o'clock.

[fol. 61] And now — this time adjournment is taken until nine o'clock the following day, to-wit: November 10, 1931, at which time all parties being present in court, the following proceedings were had:

Arguments of counsel were heard by the Court at this time.

The Court: The demurrer is overruled.

Mr. Davidson: To which Johnson Oil Refining Company excepts.

And thereupon the State of Oklahoma having rested, the following testimony was introduced on behalf of the Johnson Oil Refining Company:

G. C. LILLY, called as a witness on behalf of the Johnson Oil Refining Company, having been first duly sworn to

testify to the truth, the whole truth, and nothing but the truth, was examined in chief by A. A. Davidson and testified as follows:

Direct examination.

By Mr. Davidson:

Q. You are the same Mr. Lilly who was on the stand yesterday?

A. I am.

Q. How long have you been connected with the Johnson Oil Refining Company?

A. I have been continuously with the company since August 16, 1916.

Q. How long have you been an officer in the Company?

A. I have been assistant secretary and treasurer and [fol. 62] Secretary and Treasurer during all that time.

Q. During all the period with which you were connected with it what was the business which you transacted?

A. Principally marketing petroleum products.

Q. The principal business of the company was marketing petroleum products?

A. Yes, sir.

Q. Where was the company's office?

A. Chicago, Illinois.

Q. Has it ever been anywhere else?

A. Until about the fall of 1920, the general office was at Chicago Heights, about 25 miles south of the loop of Chicago.

Q. But since that time, has been in Chicago?

A. Yes, sir.

Q. Up to March 14, this year, the company was an Illinois corporation?

A. That is right.

Q. Since then it has been re-organized as a Delaware corporation?

A. Yes, sir.

Q. But its office is in the same place as before?

A. Yes.

Q. Did the Johnson Oil Refining Company own tank cars for the marketing business prior to the time it bought the refinery at Cleveland, Oklahoma?

A. It did.

Q. Does the company still engage in the marketing business?

A. Yes, sir.

Q. You say that is its principal business?

A. Yes.

Q. When did the company buy the refinery at Cleveland?

[fol. 63] A. August, 1922.

Q. What was that purchased for?

A. Just for the manufacture of dependable, marketable products, for our marketing business.

Q. It is near production?

A. Yes.

Q. So that it furnishes a part of the merchandise that you market?

A. Yes, sir.

Q. Where is the marketing business of the company done?

A. Principally in Indiana, Illinois, Northwestern Ohio, Wisconsin, Missouri, Michigan, Nebraska and Iowa.

Q. You say principally those states, any sold in Oklahoma?

A. Yes.

Q. How much, what proportion, small or how?

A. Very, very small.

Q. Where are these contracts for the sale of refinery products made?

A. All contracts are made in Chicago, Illinois.

Q. And the sales are made in Chicago to consignees in these various states?

A. Yes.

Q. Now you stated yesterday that the cars in question were used for transporting gasoline and other refinery products, both your own as refined at Cleveland, and purchased from other refineries elsewhere. That is correct, is it?

A. That is correct.

Q. And except as to a very small portion, all the products here at Cleveland are carried out and sold in these various states where the company sells its products?

A. Yes.

[fol. 64] Q. From where are the movements of these cars directed?

A. Chicago, Illinois.

Q. That is from your office there?

A. Yes.

Q. I think you stated yesterday, at the time you bought the refinery, you bought some additional cars. Were these cars included in a part of the purchase of the refinery, or a separate purchase?

A. Purchased under a separate contract.

Q. Now, I think you stated yesterday, if not, I will ask you again, what these cars come to Cleveland for?

A. They come to Cleveland to be loaded with the products of this refinery.

Q. And how long does that take on an average?

A. Average of twenty-four hours.

Q. And when they are loaded, what becomes of the car?

A. They are shipped to the destination, to the customers.

Q. Immediately after they are loaded?

A. Yes.

Q. Is that the only purpose of their coming to Cleveland?

A. Yes.

Q. You stated yesterday that you had private tracks on the refinery premises for about sixty-three cars.

A. I think it is sixty-seven cars.

Q. Does the company own any private trackage anywhere else?

A. Yes.

Q. Where?

A. St. Louis, Missouri, Danville, Bloomington, Jacksonville, Springfield, Chicago Heights in Illinois, a trackage in Valparaiso, Indiana. There are probably many other [fol. 65] locations that I do not recall right now.

Q. The company's own private trackage?

A. Yes.

Q. Can you state, Mr. Lilly, about how many cars these various tracks provide for, tracks you own in different states, in total?

A. The trackage has never been measured. I have never seen an estimate of it. They vary from a capacity of three to four cars to I should say, ten to twelve cars.

Q. Would these various private tracks you own in different states in your judgment accommodate the whole fleet?

A. Approximately the whole of it.

Q. Approximately the whole of it?

A. Yes.

Q. Are these cars, Mr. Lilly, in any way necessary for the operation of the refinery at Cleveland?

A. No.

Q. I take it that you could ship refinery products in other cars than your own?

A. We could lease cars.

Q. Many marketers do, do they not?

A. We have done so.

Q. Now, Mr. Lilly, I wish you would tell the Court whether, during the years these cars have been used in the interstate marketing business, whether they have been taxed in any states in which they enter?

Mr. Clark: Object to that as incompetent, irrelevant and immaterial, and I want to tell the Court why. In the first [fol. 66] place, the court indicated that this Travis case indicated that where taxes had been paid at the domicile of the owner they might be entitled to refute a fixed situs at some place else. There is no such situation in this case. What this case says is this:

(Whereupon Mr. Clark reads the case to the Court.)

The Court: Sustained.

Mr. Davidson: Exception.

Q. I will ask you, Mr. Lilly, if these cars have been assessed for taxation outside of franchise license, in the states which they enter in the course of your marketing business?

Mr. Clark: To which the State objects as incompetent, irrelevant and immaterial for the reason that it gave awhile ago. It doesn't make any difference where or when, if they are here, they are taxable here.

The Court: Overruled.

Mr. Clark: Exception.

A. Yes.

Q. Has that been true with reference to the years you have been using these cars for interstate business?

A. Yes.

Q. Has this company paid these taxes from year to year?

A. Yes.

Mr. Clark: Object to that as incompetent, irrelevant and immaterial.

[fol. 67] The Court: Overruled.

Mr. Clark: Exception.

Q. Can you name the states in which these cars are being assessed for taxation as you have stated?

A. Missouri and Nebraska, Iowa. You are referring only to ad valorem tax?

Q. Yes.

A. Wisconsin, Illinois, Ohio, Michigan, Louisiana, Indiana, Georgia, West Virginia, may be others that I can't recall now.

The Court: Oklahoma?

A. Not an ad valorem in Oklahoma, no.

Q. Have you paid any taxes in Oklahoma relative to these cars?

Mr. Clark: Object to that as being improper form.

The Court: Objection sustained.

Mr. Davidson: Exception.

Q. Did you ever pay any taxes in Oklahoma on these cars?

The Court: Objection sustained.

Mr. Davidson: Exception, We offer to prove by the witness that Johnson Oil Refining paid taxes to the State of Oklahoma under the gross earnings Statute upon the demand of the State taxing authorities, to the State of Oklahoma.

Mr. Clark: We object to the introduction of such testimony as to any years other than those for which assess-

[fol. 68] ment is herein sought to be made on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Objections sustained unless you state when. There are some other years, separate them, the year this tax was levied. Objection sustained.

Mr. Davidson: Exception.

Q. I will ask you to state, Mr. Lilly, if it isn't a fact that the State of Oklahoma through the State Tax Commission Collector is still demanding a return of these cars for taxation purposes under the Gross Earnings Statute?

Mr. Clark: We object to that as incompetent, irrelevant and immaterial, improper form and too indefinite for the Court to know whether it is incompetent.

Now, if the Court please, I will state if they still are, if it is for this year it doesn't make any difference.

The Court: Objection be sustained.

Mr. Davidson: Exception.

Q. Is it not a fact, Mr. Lilly, that they are demanding, that the State Tax Commission is demanding from you for each of the years since the companies stopped the payment of taxes under the State Gross Earnings Statute?

Mr. Clark: Object to that as incompetent, irrelevant and [fol. 69] immaterial.

The Court: Sustained.

Mr. Davidson: Exception.

Q. Now were these taxes that were assessed in the various states and paid to the States, on cars that went into those respective states?

A. No, not on any specific cars, the assessment was on cars that traveled through these states.

Mr. Clark: All questions in regard to taxes being levied is objected to by the State.

The Court: Overruled.

Mr. Clark: Exception.

Q. Do you know how long on an average these cars would remain on your private tracks in these different states?

A. One or two days.

Q. They were there for the purpose of being unloaded?

A. Yes.

Q. Now you say the cars also paid taxes in the States of Illinois?

A. Yes.

Q. What sort of a tax is that?

A. It is known as a capital stock tax.

Q. How does it work?

A. The entire property of the company every year in all states is deducted from the capital stock and surplus accounts and an assessment made on the balance, or difference.

Q. Now does this balance include tank cars that have not [fol. 70] been otherwise assessed?

A. Yes, sir, certainly.

Q. What kind of cars are these cars that the company owns?

A. Just ordinary steel shell tank cars.

Q. Are they insulated cars?

A. No, none of them.

Q. How old are they?

A. They were all second hand cars when we bought them. I don't think any of them have been manufactured since 1920.

Q. Has the company got a branch office at Cleveland?

A. Yes, sir.

Q. What is that office for?

A. For record purposes.

Q. Is any of the company's marketing business done at that office?

A. Yes, a small portion of it.

Q. As far as sales here are concerned?

A. Yes, sir.

Q. In Oklahoma?

A. Yes, sir.

Q. Have they anything to do with interstate marketing business?

A. No.

Q. Have they anything to do with the control of the cars?

A. No.

Q. Where do these cars get their repairs? Their main repairs?

A. Are made either by the railroad company on whose line the car broke down, or at some car shop that is equipped to do the kind of work necessary.

Q. Are there any particular machine or repair shops to which they are sent for repairs?

[fol. 71] A. So far as I know, we have never sent any cars to any but Coffeyville, Kansas, or Tulsa.

Q. Whose shops are they?

A. I do not know.

Q. Does the company maintain a repair shop any place else?

A. Just minor repairs made at Cleveland.

Q. No shop there?

A. No.

Q. You say the company owns no other refinery than that one at Cleveland?

A. That is right.

Q. Have you any plant of any kind at other places?

A. Yes, many of them, market plants, manufacture lubricating oil at Chicago Heights.

Q. Are these cars used for this also?

A. Yes.

Q. Now, your attention was called to a statement in the Railway Guide with reference to forwarding bills for repairs, I believe, to a Mr. Goward. Who is Mr. Goward?

A. Mr. Goward's title is "Superintendent of Transportation". His duties were merely clerical, to keep a record of these cars and to report to the Chicago office.

Q. Who was his superior?

A. The traffic manager.

Q. And where was his office?

A. Chicago, Illinois.

Q. You heard the deposition of the chief clerk of the car accountant's office of the Katy Railroad of Parsons, Kansas, with reference to his statement of the average number [fol. 72] of cars in Pawnee, the daily average number of cars in Pawnee County, did you not?

A. No, I did not hear that deposition.

Q. Well, I *will*, he testified that he estimated the daily average of cars in Pawnee County during the course of a year, by taking the number of cars on the first and fifteenth of each month and in that way arriving at a daily average of a year, stating that was the customary way among Railroads. Do you know of that system or custom among railroads?

A. I have heard of it.

Q. Do you know, can you state to the Court whether that rule custom or practice is with a view of accounting (to the Interstate Commerce Commission?),

A. I understand that it is not for accounting purposes, but for statistical purposes, for the analysis of the Railway Association.

Q. Have you personally, Mr. Lilly, made a calculation of the daily average of cars in Pawnee County during the years in question, Twenty-five, Twenty-six and Twenty-eight?

A. I made a calculation of such but I had assistance, it was made under my jurisdiction and under my direction.

Q. Now how did you do that?

A. We took the trackage, lists of cars at the refinery for each day in the year from January 1st, 1926, to December 31, 1930.

Q. The total number during the course of the year?

A. Counted the total number of cars for each day for a year.

Q. How did you make an average?

A. Divided the total by three hundred sixty-five.

Q. Can you tell what the average number was in 1925, 1926 and 1928, as a result of that calculation?

[fol. 73] A. I cannot tell you for '25 because the records were destroyed by a flood at the refinery.

Q. What were the other years?

A. 1926, 37 cars; 1927, 37 cars; in 1928, 42 cars; 1929, 55.

Q. In making the purchase of cars from time to time, where are those purchases made?

A. Contracts of purchase were made in Chicago.

Q. In every instance?

A. Yes.

Mr. Davidson: You may take the witness.

Mr. Clark: Comes now the State of Oklahoma and moves the Court to strike from the record all testimony concerning the payment of taxes during the years in question on the grounds that it is incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Clark: Exception.

Cross-examination.

By Mr. Clark:

Q. Mr. Lilly, you say some of the repairs are made at Cleveland?

A. Yes.

Q. They have on hand such material that the repairs would require?

A. Yes.

[fol. 74] Q. Does the Johnson Oil Refining Company make repairs at any other place?

A. No.

Q. And it doesn't carry in stock any repairs except at Cleveland?

A. No.

Q. Now in the matter of average number of cars that you just testified to, that is the average number where?

A. At the refinery at Cleveland.

Q. On the refinery's loading track?

A. Any cars that were on the tracks there, the loading, repair or M. K. & T. switch track.

Q. That includes the ones that were on the M. K. & T. switch tracks?

A. Yes.

Q. How much repair track have you there?

A. I can't say, I don't know the length of the track.

Q. Have you a sixty-three to sixty-seven loading track?

A. The loading track capacity is sixty-seven cars.

Q. And you don't know how much repair trackage?

A. No, I don't, but I judge it would hold twelve to fifteen cars.

Q. What would you judge that on?

A. Just having traveled by and having seen in a hundred times.

Q. You say you have an oil plant up in Illinois, a lubricating oil plant track in Illinois?

A. Yes.

Q. And you use your cars in connection with that?

A. Very infrequent. That is a compounding and barreling plant.

Q. What cars you use there you take off barrels from a gasoline distributing plant and use there?

[fol. 75] A. Yes, sir.

Q. These various trackages you own, for what purpose are they used?

A. For the accommodation of cars to be unloaded.

Q. There are no points to which cars are directed to be returned when empty, are there?

A. No, sir.

Q. As to this corporation tax, or capital stock tax, that you paid in Illinois, if you had paid taxes on an ad valorem basis on this fleet in Pawnee County for the years in controversy here, the State of Illinois would have allowed you to deduct that valuation in paying capital state tax?

A. Yes.

Mr. Clark: That is all.

By Mr. Rowe:

Q. Mr. Lilly, these cars that are going to different destinations and are unloaded, they are returned to Cleveland when empty, are they not?

A. The majority, that is, yes.

Q. You don't leave any of the empty cars in other states on other tracks, do you?

A. No.

Q. They are returned?

A. Yes.

Q. Mr. Davidson asked you with reference to the other trackage being sufficient to house all the cars, that would not be possible would it?

A. No.

Q. You don't have any one place sufficient to accommodate your whole fleet of cars?

[fol. 76] A. No, not any one place.

Q. But you do have more room at Cleveland?

A. Yes. The reason for that is in trying to supply a hundred and sixty-five stations from this state, a hundred and sixty-five places are all different localities.

Q. And they all return to Cleveland?

A. Yes, sir.

Q. On this question of the daily average, do you mean by daily average, that that was the number of cars that was in Cleveland as a daily average?

A. I mean that we took the inventory of cars in the refinery yards of the entire fleet from January 1st, 1930, to December 31, 1930, and added them all up and divided by three hundred sixty-five.

Q. And the other cars that were not there, where would they be, in transit or being unloaded at other places?

A. Yes, sir.

Q. Do you know how many cars the Osage trackage will hold?

A. No, I do not.

Mr. Davidson: Object to that as incompetent, irrelevant and immaterial.

The Court: Sustained unless it is their property.

Mr. Rowe: I will withdraw that.

Q. There is no other place or other track that the company has, except Cleveland, where you have empty cars return?

A. No.

Q. Just what was stamped or stenciled on these cars that [fol. 77] were sent to Cleveland, Oklahoma, in 1925 and including 1929?

A. During part of that time I think, all or nearly all, of these cars were stenciled: "Johnson Oil Refining Company, Cleveland, Oklahoma."

Q. The word "home" did not appear?

A. No.

Q. Did it at any time?

A. No, not to my knowledge.

Q. What did appear, as I understand it, is "Johnson Oil Refining Company, Cleveland, Oklahoma"?

A. That is right.

Q. Now when these cars were billed out to various points of destination do you know whether or not it was recited in the bill of lading, or other bills, "When empty return to Cleveland, Oklahoma"?

A. The billing on each tank car of oil is accompanied by a return billing for the convenience of the customer or station who unloaded that car, merely so that they can make no mistake about the route, about how the car should be returned.

Q. And on all of these cars it was specified: "To be returned to Cleveland, Oklahoma"?

A. Unless it was sent somewhere else, yes.

Q. This question might be competent. Mr. Lilly, in your computation attempting to show the daily average number of cars at Cleveland, did you take into consideration cars that might have been stored, or on the Osage tracks?

A. No.

Q. You didn't consider that in your computation?

[fol. 78] A. No.

Q. Is it not possible, and is it not a fact, that during the years in controversy, a number of cars were on the Osage tracks?

Mr. Davidson: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Davidson: Exception.

A. I don't know, probably they were. I never went over there to look at tank cars.

Q. You went over there just as much as you went to Cleveland to count those?

A. No.

Q. It is probably that they were?

A. Yes, probable.

Q. Highly probable?

A. Yes, sir.

Q. And of course, if they were, they were not considered in your computation?

A. No.

Q. And yet they were returned at the Cleveland plant?

A. If they were, they were counted at the Cleveland plant.

Mr. Rowe: That is all.

Redirect examination.

By Mr. Davidson:

Q. The company had made a return each year, hasn't it, since it has owned the refinery for taxation to the assessor of this County?

[fol. 79] A. Yes, sir.

Q. And has paid the taxes so assessed?

A. Yes, sir.

Q. Are these cars a plant facility?

A. We do not consider them so.

Q. Of what are they a facility?

A. Marketing business.

Q. The marketing business?

A. Yes, sir.

Q. Is any part of the investment made in these cars an investment in the refinery itself? In other words, is this a local investment or a general business investment in your marketing business?

A. Well, it is general investment in property for the use of the company, for the use of its business everywhere.

Q. You were asked whether you stored any of the cars on any of the tracks you own, private tracks that you owned in the different states. Have you ever had any occasion for any of the cars to be laid up for storage?

A. No, we have never stored any cars, they are always in use. In fact for several years our fleet has been insufficient. We have leased cars.

Q. I take it that if those cars were idle, the tracks were under your control and could be used for that purpose?

A. They could be used.

Q. You referred to a hundred and sixty-five marketing stations, what do you mean by that?

A. Stations where various petroleum products can be received in tank car loads and stored for sales.

[fol. 80] Q. And in what states are those stored?

A. Illinois, Indiana, Ohio, Wisconsin and Missouri.

Q. Now you were asked about the directions in the bill of lading. You stated those directions were for the information of your customers so that they would know where to send the cars when empty. That is correct is it?

A. Yes, sir.

Q. Did the words "Johnson Oil Refining Company, Cleveland, Oklahoma" stenciled on your cars serve that purpose?

A. No, I don't think so.

Q. Do you know why that was stenciled on the cars?

A. No.

Q. Did the fact that the words "Johnson Oil Refining Company, Cleveland, Oklahoma," were stenciled on the cars a direction for the return of the car to Cleveland, Oklahoma?

A. No.

Q. So that you put that in the bill of lading?

A. Yes.

Q. So, Mr. Lilly, if these cars ever became idle, hadn't any business to do, that you could take care of practically, approximately the whole fleet in your various tracks in various states?

A. I hesitate to say that we could take care of all of them but the majority of them, the bulk of them.

Q. You have never had occasion to do that anywhere?

A. No.

Q. Neither Cleveland nor any other place?

A. No.

Mr. Davidson: I believe that is all.

[fol. 81] The Court: May be you could answer some questions I would like to know about.

Q. How many cars did you pay ad valorem tax on in West Virginia in 1926, do you know?

A. No, I don't remember. I would have to have my records here before I could answer that question.

Q. And you don't remember how much you paid?

A. No.

Q. Now whatever you did pay in West Virginia in 1926, was that amount deducted from the value Illinois placed on them the same year?

A. Not the amount of tax was deducted, but the value of the assessment was.

Q. Would be just the same?

A. Yes, sir.

Q. Same with all those states you mentioned?

A. Yes.

Q. And you couldn't give me the amount of tax you paid in any of those states in any one year on an ad valorem basis on these cars?

A. Not from memory, but if I had an opportunity to see my records I certainly could do so.

Q. Were those taxes paid in those states all on an ad valorem basis?

A. So far as my experience with the taxation of tank cars, the tax in all other states except in Minnesota and Oklahoma, which is a gross earnings tax.

Q. This might be a legal question. Do you know whether [fol. 82] those states have a special statute upon those cars similar to the statutes of Colorado?

A. I don't know that. I do kno-, however, that if you don't return your cars for assessment in those states, if you don't pay your taxes, they will tie up a car for you if you don't pay them. The Johnson Oil Company has never had any cars tied up for nonpayment of taxes.

A. Did each of those states claim a situs in their jurisdiction for these cars on any amount of them for ad valorem taxes?

A. I don't know that, they claimed a situs there, but the Tax Commissioners of those states demand a return of the cars used in that state for taxes. We have a time or

two tried to protest those taxes, principally in Michigan, but never got anywhere with it.

Q. They claimed a return of those cars for taxation?

A. Yes, sir.

Q. And all the cars used in those states were taxed on an ad valorem basis?

A. All except Minnesota and Oklahoma.

Q. All except Minnesota and Oklahoma?

A. Yes.

Recross-examination.

By Mr. Clark:

Q. Mr. Lilly, considerable talk has been made here for ability to store cars in different states. Now, as a matter of fact, the reason you don't store cars there and the reason you don't send them there and do send them down here to Cleveland is because you have more use for them down here?

A. The reason we don't store them there is because we [fols. 83–94] always have use for them.

Q. The reason you send them to Cleveland is because you always have use for your cars, isn't it?

A. It is the one place where we always have use for petroleum cars.

Q. That could be why?

A. Yes, and nothing else.

Redirect examination.

By Mr. Davidson:

Q. If the cars were empty and needed storage it would be less expensive to store them on your own private tracks than to send them down here for storage?

A. Certainly.

Q. You wouldn't think of sending to Cleveland for storage?

A. No, haven't any storage for them.

Q. The only purpose of sending them to Cleveland is for transporting the refinery products?

A. Yes.

Recross-examination.

By Mr. Rowe:

Q. Then why do you have printed on the cars: "Cleveland, Oklahoma"?

A. It doesn't appear on the cars now, "Cleveland, Oklahoma," it was merely an advertising proposition and nothing more.

Mr. Rowe: That is all.

Mr. Davidson: That is all.

The Court: We will take about a five minutes' recess at this time.

[fol. 95] G. A. MINDEMAN, called as a witness on behalf of the Johnson Oil Refining Company, having been first duly sworn to testify to the truth, the whole truth, and nothing but the truth, was examined in chief by A. A. Davidson and testified as follows:

Direct examination.

By Mr. Davidson:

Q. What is your name?

A. G. A. Mindeman.

Q. Are you connected with the Johnson Oil Refining Company?

A. Yes, sir.

Q. In what capacity?

A. Traffic man.

Q. Are you familiar with the trackage at Cleveland, Oklahoma?

A. Yes, sir.

Q. How much trackage have they there?

A. About sixty-seven spots as near as I can check.

Q. Is that trackage all on the premises of the company?

A. Yes, sir.

Q. Have you any storage trackage outside of that?

A. Not at Cleveland.

Q. Not at Cleveland?

A. No.

Q. Mr. Mindeman, when a loaded car is delivered to the Railroad company for transportation to its destination,

do you know how long it remains in the custody and control of the railroad company?

A. Until it is delivered at the spot of destination.

[fols. 96–106] Q. In returning cars with a bill of lading to Cleveland over the various lines how long does that possession and custody and control of the cars continue?

A. Until it's delivered to the destination at Cleveland.

Q. Do you know at whose risk it is held prior to that time?

A. Carrier's risk.

Q. Katy Railroad?

A. Yes, sir, Katy Railroad.

Mr. Davidson: That is all.

Mr. Clark: That is all. No questions.

Witness excused.

Mr. Davidson: We rest.

The Court: Anything in rebuttal?

Mr. Clark: We rest.

Whereupon the arguments to the court are made at this time.

The Court: Let the record show Judgment for Plaintiff as per J. E.

Mr. Davidson: We want the record to show that Johnson Oil Refining Company excepts to the judgment of the Court in each case.

Which was all the evidence offered or introduced at the trial of said cause.

[fol. 107] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

ORDER FOR JUDGMENT—Nov. 10, 1931

And now on this 10 day of November, 1931, Judgment for Plaintiff as per J. E.

[fol. 108] IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1805

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

MOTION OF JOHNSON OIL REFINING COMPANY TO SET ASIDE THE DECISION OF THE COURT AND TO GRANT IT A NEW TRIAL—Filed Nov. 12, 1931

Comes now Johnson Oil Refining Company and moves the Court to vacate and set aside its decision in the above entitled cause and to grant it a new trial, for the following reasons which materially affect the substantial rights of said Johnson Oil Refining Company:

1. Because the Court erred in overruling the demurrer of Johnson Oil Refining Company to the evidence introduced by the County of Pawnee and in holding, ruling and deciding upon said demurrer and that such evidence so offered and introduced established a definite situs of the [fol. 109] cars of said Johnson Oil Refining Company, and each of them, in said Pawnee County.

2. Because the Court erred in refusing to permit Johnson Oil Refining Company to prove that the State of Oklahoma, as such, and through its Tax Commission, was claiming and asserting the right of the State of Oklahoma to assess said cars for taxation under Section 9981 of the Compiled Oklahoma Statutes of 1921, and was demanding that said Johnson Oil Refining Company make return to it of its said tank cars for taxation under said statute for the benefit of the State of Oklahoma.

3. Because the Court erred in finding, concluding and deciding that all of the cars of Johnson Oil Refining Company were constructively in the State of Oklahoma and in Pawnee County, Oklahoma, at all times, within the meaning of the statute of Oklahoma providing for the taxation of personal property.

4. Because the decision and judgment of the Court is contrary to the evidence in this respect, to-wit, that the evidence established, without dispute, that the business in which the cars of Johnson Oil Refining Company were used

and employed was the marketing, sale and transportation by it, as a non-resident of Oklahoma, of refinery products outside of said State of Oklahoma and that none of said cars were in the said state, or in Pawnee County, except for the purpose of receiving a load of merchandise to be shipped out of the state and for no other purpose, and that said cars remained in said Pawnee County, and in said state, only long enough to receive said load, and that said cars were therefore in transit while within said State of Oklahoma.

5. Because the Court erred in holding, concluding and adjudging that the taxation of all of the cars of Johnson [fol. 110] Oil Refining Company, used and employed by it in its marketing business conducted by it at its domicile in the State of Illinois and in the transportation of refinery products outside of the State of Oklahoma, did not amount to a deprivation of its property without due process of law and was not in violation of the Fourteenth Amendment to the Constitution of the United States.

6. Because the decision and judgment of the Court is contrary to the evidence in this respect, to-wit, that the evidence establishes, without dispute, that only a small number of the cars of Johnson Oil Refining Company, not to exceed 57, on an average, were in Pawnee County and said State of Oklahoma at any one time during the said year 1928, and that no one car of the entire number owned, used and operated by said Johnson Oil Refining Company was in the State of Oklahoma oftener than eighteen times in the course of said year 1928, and at such times remained only long enough, not to exceed twenty-four hours at a time, to receive a load of refinery products for interstate shipment out of said State of Oklahoma, and the Court erred in holding, ruling and deciding that an assessment of taxes against all of said cars did not amount, as contended by Johnson Oil Refining Company, to a deprivation of its property without due process of law.

7. Because the Court erred in holding, ruling and deciding that the situs for taxation of the entire number of cars, owned, used and employed by Johnson Oil Refining Company was in Pawnee County, Oklahoma, at the location of its refinery in Cleveland, in said county, which said refinery supplied merchandise for shipment and sale by said

Johnson Oil Refining Company outside the State of Oklahoma, and in the course of its marketing business conducted and managed from its principal office in the state of its [fol. 111] domicile, the State of Illinois.

8. Because the Court erred in holding and deciding that the evidence introduced was legally sufficient to overcome the presumption that the situs of the cars owned, employed and used by Johnson Oil Refining Company in the conduct of its marketing business conducted by it in Illinois and various other stated, was at its domicile in the State of Illinois, and in holding and deciding that the evidence introduced established a definite and exclusive situs, for taxation of said cars, in Pawnee County, Oklahoma.

9. Because the Court erred in expressly holding and ruling that the consent of Johnson Oil Refining Company to a credit upon the assessment of its entire number of cars in the State of Illinois for taxes assessed and paid upon said cars in other states was an admission by it that the situs of said cars, for purposes of taxation, was not in the State of Illinois, as the domicile of said Johnson Oil Refining Company.

10. Because the decision and judgment of the Court was contrary to the evidence in this respect, to-wit, that the evidence establishes, without dispute, that only 48 cars were in Pawnee County on the first day of January, 1928, and erred in holding and deciding that the tax upon 333 cars, in addition to said number so in Pawnee County on January 1, 1928, did not constitute the taking of property of Johnson Oil Refining Company without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

11. Because the Court erred in holding, ruling and deciding that Pawnee County had the right to assess for taxation all of the cars of Johnson Oil Refining Company as a reciprocal duty for benefits conferred upon the entire number of cars as a unit.

[fol. 112] 12. Because the Court erred in holding, ruling and deciding that the direction of Johnson Oil Refining Company, in the bills of lading for cars of refinery products to consignees of said shipments in foreign states, to cause said cars, when empty, to be returned to Cleveland, Okla-

homa, established conclusively the intent of Johnson Oil Refining Company to fix the situs of each of said cars at Cleveland, Oklahoma, notwithstanding the uncontradicted evidence that the purpose of so directing their movements was to receive a load of refinery products for interstate shipment.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys for Johnson Oil Refining Company.

[File endorsement omitted.]

[fol. 113] IN COUNTY COURT OF PAWNEE COUNTY, OKLAHOMA

No. 1805

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

JOURNAL ENTRY OF JUDGMENT—Filed Nov. 12, 1931

This cause came on to be heard by the Court, pursuant to assignment for trial by the Court, on the 9th day of November, 1931, and the trial thereof was concluded on the 10th day of November, 1931.

Upon consideration of the evidence, and the argument of counsel, and the Court being advised in the premises, found and concluded:

That the situs for taxation of the tank cars owned by Johnson Oil Refining Company, and used and employed in its business, was at its refinery situated in Pawnee County, to-wit, at Cleveland in said county, and that said Pawnee County had the right and authority to assess for taxation the entire number of said tank cars owned, operated and used by said Johnson Oil Refining Company.

[fol. 114] That the said tank cars of Johnson Oil Refining Company were omitted from taxation in said County of Pawnee for the year 1928.

That the County Treasurer of said Pawnee County was duly authorized and empowered to assess all of said cars for taxation for the year 1928 as property omitted from taxation for said year, to-wit, 380 cars.

That the fair cash value of said cars for said year 1928 was $190,500.00.

It was therefore considered, ordered and adjudged by the Court that there be entered and spread on the assessment roll of said Pawnee County an assessment against said Johnson Oil Refining Company, in respect to said tank cars, in the sum of $190,500.00, and that a tax be extended on the tax rolls of said county for the year 1928 in accordance with said assessment, as provided by law, to which findings, conclusions and judgment of the Court Johnson Oil Refining Company at the time excepted.

And now on this 12th day of November, 1931, the motion of said Johnson Oil Refining Company to set aside the decision of the Court and to grant it a new trial came on to be heard by the Court, and upon consideration thereof, and being duly advised in the premises:

It is ordered that said motion for new trial be and the same is hereby overruled, and to which ruling and judgment of the Court Johnson Oil Refining Company excepts, and gives notice in open court of its intention to appeal from the judgment of the Court to the Supreme Court of Oklahoma, and requests the Clerk of said Court to note said notice of appeal on the proper docket, and which is done accordingly.

And for good cause shown, Johnson Oil Refining Com-
[fol. 115] pany is given and granted an extension of thirty days from this date in which to make and serve upon the opposing party a record and casemade of said judgment and proceedings, the opposing party to have ten days after service thereof to suggest amendments, said casemade to be settled and signed upon five days' notice by either party.

It is further ordered by the Court that the judgment herein be stayed and superseded for sixty days from this date, and pending the perfection of an appeal from said judgment, and to be stayed and superseded thereafter until the final determination of said appeal in the court of last resort.

L. N. Kimrey, County Judge. (Seal.)

O. K.
McCollum & McCollum, A. A. Davidson, for Johnson Oil Refining Company.

O. K. Ed. Waite Clark, for Plaintiff.

[File endorsement omitted.]

[fols. 116–120] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

ORDER OVERRULING MOTION FOR NEW TRIAL—Nov. 12, 1931

And now on this 12 day of November, 1931, Motion for New Trial of Defendant overruled. Exception. Notice given of an appeal to the Supreme Court.

[fol. 121] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

STIPULATION AS TO CASE-MADE

The parties hereto, by their respective counsel, hereby stipulate and agree that the above and foregoing is a full, true, correct and complete case-made in the above entitled cause, and contains a full, true, correct and complete copy of the transcript of proceedings had before the County Treasurer of Pawnee County, Oklahoma, and of the notice of appeal and appeal bond, and that the foregoing is also a full, true, correct and complete copy and transcript of all the proceedings in the County Court of Pawnee County, on appeal, including all the objections made to the proposed assessment of taxes and all the evidence offered or introduced, findings, motions, orders and rulings made, all the exceptions allowed, and the judgment in said cause, and all of the record upon which the judgment and journal entry in said cause was made. The right to suggest amendments to said case-made, and notice of the settlement and signing thereof, are hereby waived, and it is agreed that said case-made may be settled and signed at any time without further notice by either party.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys for Johnson Oil Refining Company. C. E. Mitchell, County Attorney, Pawnee County. Ed Waite Clark, Special Counsel.

[fol. 122] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

NOTICE OF SETTLEMENT OF CASE-MADE

To the attorneys for said plaintiff:

You are hereby notified that on the — day of ——, 1931, at — o'clock — M., or as soon thereafter as counsel can be heard, the case made in said cause, with the amendments heretofore suggested by you, will be presented to the Honorable L. N. Kimrey, at his chambers in the City of Pawnee, Oklahoma, for settlement.

——— ———, Attorneys for Defendants.

Service of the above notice is hereby accepted on this the — day of ——, 1931.

——— ———, Attorneys for Plaintiff.

[fol. 123] IN COUNTY COURT OF PAWNEE COUNTY

No. 1805

In the Matter of the Assessment Against JOHNSON OIL REFINING COMPANY of Alleged Omitted Property for the Year 1928

CERTIFICATE OF CASE-MADE

I, the undersigned, Judge of the County Court within and for the County of Pawnee, State of Oklahoma, do hereby certify that the foregoing was presented to me as a case made in the action above entitled; that at the time of the presentation of said case made to me for settlement and signing, there appeared C. E. Mitchell, County Attorney of Pawnee County, and Ed Waite Clerk, as special counsel on behalf of the State and Pawnee County, and A. A. Davidson and J. A. McCollum, counsel for and on behalf of John-

son Oil Refining Company; and it appearing that corrections in said case made, as served, have been made by mutual agreement of the parties; that no further amendments to said case made as corrected have been suggested by either of the parties; that each of them has waived the right to make such suggestions and has waived notice of the time of settlement, and both parties have, at this time, by their respective counsel, joined in the request that said case made, as so corrected, be settled and signed at this time, and it appearing to me, upon examination thereof, that the same is a true and correct statement and complete transcript of the record and all proceedings in said cause, I do now settle, sign and certify the same as a true and correct case-made, and do hereby direct that the court clerk attest [fol. 124] the same with his name and the seal of said court, and file the same in his office as provided by law.

Witness my hand at Pawnee, in Pawnee County, Oklahoma, this 19 day of December, 1931.

L. N. Kimrey, County Judge.

Attest:

Jos. D. Soulsby, Court Clerk. Ethel Traver, Deputy. (Seal.)

[fol. 125] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 126] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of Johnson Oil Refining Company

No. 23342

The Board of County Commissioners of the County of Pawnee, Oklahoma, The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

Johnson Oil Refining Company, Defendant in Error

Stipulation for Consolidation of Causes—Filed Feb. 11, 1932

It is hereby stipulated and agreed by and between the undersigned, subject to the order of the court, that the foregoing entitled and numbered causes may be consolidated in this court for the purpose of briefing and argument, in as much as each of them involves the same property, to-wit, property of Johnson Oil Refining Company, and presents the question of its taxability, and the right to assess the same for ad valorem taxation by local assessment and taxing officers within the State of Oklahoma.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys of Record for Johnson Oil Refining Company. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma. C. K. Templeton, by Leander Hall, Asst. County Attorney of Osage County, Oklahoma. John R. Pearson, of Special Counsel for Osage County, Oklahoma, in Cause #23334. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[fol. 127] In Supreme Court of Oklahoma

23218, 23219, 23334, 23342

[Titles omitted]

Order of Consolidation—Feb. 16, 1932

And now on this day it is ordered by the court that the stipulation of all parties to consolidate the four foregoing causes, be, and the same is hereby approved.

[fol. 128] Minute entry of argument and submission, December 13, 1932, omitted in printing.

[fol. 129] IN SUPREME COURT OF OKLAHOMA

23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

JUDGMENT—Dec. 20, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be affirmed.

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby affirmed.

Opinion by Riley, J.

[fol. 130] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23219

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23342

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Error from the District Court of Pawnee County, State of Oklahoma

Honorable Thurman S. Hurst, Judge

Reversed and Remanded

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Osage County, State of Oklahoma

Honorable Henry Wood, Judge

Reversed

Syllabus

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is

located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed Waite Clark, P. E. Rowe, R. K. Robertson, for Pawnee County.

[fol. 131] C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig, for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, for Johnson Oil Refining Company.

[fol. 132] OPINION—Filed Dec. 20, 1932

RILEY, J.:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferrett. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in inter-state and intra-state commerce. By the use of them the Johnson Oil Refinery Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally

the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other track- [fol. 133] age at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seems to be the result of sales contracts made from the office at Chicago. O. C. Goward is the Superintendent of Transportation for the refinery whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs, they are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no ad valorem tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S., 1921, provides:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years it is not estopped to deny taxation in toto.

It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation [fol. 134] possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. Travis v. Dicky, 96 Okla. 256, 222 P. 527; State v. Timbrooks Est. 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Gulf Ref. Co. v. Tillinghast 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. Williamson v. Prairie Cattle Co., 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of the tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage [fol. 135] County, and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J.; Hefner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J.; Andrews, J., absent.

[fol. 136] [File endorsement omitted]

[fol. 137] IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

[fol. 138] PETITION FOR REHEARING—Filed Jan. 14, 1933

Now comes Johnson Oil Refining Company and respectfully petitions the court to grant a rehearing in the above entitled causes, and as grounds therefor the petition says:

I

The court has overlooked the controlling effect of a fundamental principle of taxation, applicable to the facts of record, viz., that the right of a state, or municipality, to tax depends upon, and is measured by its ability to give the protection of its laws to the property taxed, taxation and protection being reciprocal.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194;
Cooley on Taxation, Vol. 1, p. 83;
Webster v. City of Fargo, 82 N. W. 732;
Rolph v. City of Fargo, 76 N. W. 242;
Williams v. Detroit, 2 Mich. 560;
Mobile v. Baldwin, 51 Ala. 61;
Chicago & Northwestern R. R. Co. v. State, 108 N. W. 557;
Cooley's Constitutional Limitations (4th ed.), p. 617.

It is upon this principle that the cars of Johnson Oil Refining Company, engaged in the business of their owner in other states, are taxed there, proportioned to the bene-

[fol. 139] fits accorded them while in such states on such business.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Union Refrigerator Transit Co. v. Lynch, 177 U. S. 194;
Gray on "Limitations of the Taxing Power", p. 59;
Keith Ry. Equipment Co. v. Board of Review, 119 N. E. 302.

Upon the foregoing principle:

(a) The admitted use, and the continuous presence, of the major part of the cars, at all times, in other states, and on business which makes such continued use and employment necessary in the free conduct of that business, precludes the possibility of an actual situs for the entire fleet in Pawnee County, or at any one place.

(b) Because of the uncontroverted fact that more than 300 cars of the fleet are continuously absent from the state (not the identical cars, but on an average), engaged in a distinct and separate business from the operation of the refinery, the State of Oklahoma cannot afford the protection of its laws to such cars, the same being subject to the laws of other states in which they are transacting the business of their owner.

[fol. 140] The fleet of cars cannot therefore be taxed as a whole, as was done by the taxing authorities of Pawnee County, on the basis of an actual situs there, because the fleet as a whole was never in Pawnee County or in the state, and therefore such a tax is not only unequal and double taxation, but amounts to a taking of private property without just compensation and to a taking of property without due process of law, and deprives Johnson Oil Refining Company of the equal protection of the law, which constitutional guaranties petitioner has at all times invoked in respect to the taxes assessed against its said property.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341;

Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Frick v. Pennsylvania, 268 U. S. 473;
Louisville Ferry Co. v. Kentucky, 188 U. S. 385;
Union Transit Co. v. Kentucky, 199 U. S. 194.

II

The conclusion of the court overlooks the uncontradicted and fundamental fact that the main and principal business of Johnson Oil Refining Company is the marketing of refinery products in interstate commerce, and not, as the opinion indicates, the operation of the refinery at Cleveland, the [fol. 141] refinery being a distinct entity and but one of the sources of the commodities dealt in and sold in interstate commerce, which, though taxable as a separate entity because of its location, is an adjunct to the main business in which the company makes its profits.

In arriving at its conclusion the court has overlooked the evidence that the same cars are used also in the transportation of refinery products from other refineries as well as from the refinery at Cleveland, and that they are used in the transportation of the products of the company's lubricating plant at Chicago Heights, as well as transporting gasoline from its bulk stations located in several states (C-m. 23328, p. 19).

It also overlooks the evidence that the cars are an investment in the marketing business, not in the refinery (C-m. 23342, p. 19).

It has also overlooked the testimony that no cars were allotted to the refinery, but were in fact used generally, and without discrimination, in the company's marketing business (C-m. 23334, p. 58).

It has overlooked the testimony that such control as the Cleveland office has over the cars is for routing purposes only (C-m. 23342, p. 34) and that the Cleveland office is a record office only and has nothing to do with the marketing business nor with the control of tank cars (C-m. 23218, p. 58).

It also has overlooked the fact that taxes were imposed and paid on the cars in seventeen states of the Union, in [fol. 142] all but two of which the tax is upon an ad valorem basis (C-m. 23342, pp. 16, 17; C-m. 23334, pp. 59, 60; C-m. 23334, p. 25).

III

The cars are not an integral part of the refinery, which is a local business, and the functions of which are confined solely to the manufacture of refinery products, wholly independent of the ownership and use of tank cars. The sole function of the cars is transportation, it being immaterial who manufactures or produces the commodity transported. Being owned by a non-resident, they cannot be taxed in Oklahoma, Section 9583, C. O. S. 1921.

IV

The court has overlooked the very serious consequence of its decision that the entire fleet of cars is taxable in and by Pawnee County. The cars are the instrumentalities and means by which a foreign marketing business is carried on in states other than Oklahoma. The same instrumentalities are subject to such tax as the respective states in which they enter to transact the business of their owner may impose, and have in fact imposed, in the exercise of a right recognized by the Supreme Court of the United States. To tax the entire fleet in Oklahoma is to infringe upon the freedom of commerce, being practically a denial of the right of the company to engage in interstate busi- [fol. 143] ness and to import merchandise, by means of these cars, into other states, and, in effect, denies the right of such other states to exercise the same privilege accorded to the State of Oklahoma, if it sees fit to exercise it.

V

The case of Prairie Cattle Co. v. Williamson, 5 Okla. 488, cited in the opinion, is not, we submit, in point. In that case cattle of the Prairie Cattle Company, evidently a non-resident, were found in Beaver County, Oklahoma, into which they had drifted from another range. The number of such cattle in Beaver County, grazing there in the year 1895, was estimated to be six hundred. The decision that the cattle were taxable in Beaver County rested upon a special statute providing that "whenever any live stock shall be located in this territory for the purpose of grazing it shall be deemed to have acquired an actual situs there for the purposes of this act," and which was an act provid-

ing for taxation of personal property "located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September." The court held that the legislature had authority to give such cattle a taxable situs. We submit, therefore, that the decision is inapplicable to the record in these cases as an authority on the question of actual situs, as distinguished from a legislative situs.

[fol. 144] We submit, therefore, upon the facts, that the tax assessed is beyond the power of the state to impose, and upon property not within its jurisdiction, is an infringement upon the freedom of commerce, places an undue burden upon interstate commerce and violates the Fourteenth Amendment to the Constitution of the United States.

For the foregoing reasons, and in view of the tax assessments on the property, amounting to over a million dollars and entailing a heavy burden of taxation, and in view of the important questions involved, and the far reaching effect of the decision, we earnestly request a rehearing and reconsideration of these cases.

Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Attorneys for Johnson Oil Refining Company.

[fol. 145] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

[Titles omitted]

(Consolidated)

ORDER DENYING PETITION FOR REHEARING—Jan. 31, 1933

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause- be, and the same is hereby denied.

Swindall, J., dissents.

[fol. 146] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

DISSENTING OPINION ON REHEARING—Filed Jan. 31, 1933

SWINDALL, J., dissenting:

An opinion was rendered in these consolidated causes by this court on the 20th day of December, 1932, with which I cannot agree.

The Johnson Oil Refining Company is a corporation organized under the laws of the State of Illinois engaging in the business of refining and selling petroleum products. To facilitate its business it maintains and operates a fleet of approximately 381 railroad oil tank cars. By the use of them the Johnson Oil Refining Company transports refined products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this state. Sometimes the company purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked "Johnson Oil Refining Company, Cleveland, Oklahoma," and "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma." The empty cars are, unless diverted by special order as aforesaid, returned to Cleveland. [fol. 147] Repair trackage is maintained at Cleveland which accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. Throughout the year the company has an average of approximately 64 cars per day at Cleveland, Pawnee County, Oklahoma, and an average of approximately 50 cars per day at Osage, Osage County, Oklahoma, where incoming and outgoing cars are held by the railroad company when congestion occurs at the refin-

ery and when economical railroading requires. The remainder of the 381 cars are outside the State of Oklahoma in various other states. The cars move in sixteen states. This company maintains an office in Chicago where its officers having ultimate executive control reside. But, no trackage for cars is maintained in Chicago. Cleveland is the one place where the company always has use for these cars. All of the cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products are the result of sales contracts made from the office in Chicago, Illinois. The superintendent of transportation for the refinery lives in Cleveland and that office has control and supervision over the cars. No tax is paid on these cars in Oklahoma. A capital stock tax is paid in Illinois and they are taxed as personal property in several of the states in which they travel.

Upon these facts the opinion delivered in the causes held, first, that none of the cars were taxable in Osage County, Oklahoma, and, second, that the entire fleet of 381 cars were taxable in the State of Oklahoma in Pawnee County on the theory that all of them had their situs at that place in this state. It is from this latter proposition that I dissent. The tax sustained by the opinion is clearly a direct tax upon tangible personal property a large proportion of which is constantly outside the State of Oklahoma, although [fol. 148] the specific items of property making up the whole are regularly in and out of the state. It is my opinion that a tax so laid is a violation of the 14th Amendment to the Constitution of the United States, that the State of Oklahoma is taxing property outside its jurisdiction.

Mobilia sequuntur personam was a well established maxim of the common law, and the situs of personal property of every description, wherever it was actually kept or located, was held to be at the domicil of the owner and the property was subject to the jurisdiction of the owner's sovereign. 26 R. C. L. p. 273-4, citing St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 U. S. (L. Ed.) 192, and Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497. It is said that this doctrine grew up when most personal property was of a nature which was kept close to the person of the owner, was small in amount, and was seldom removed from one jurisdiction to another without the removal also of its owner. In recent times,

with the growth of modern industry and transportation, an extraordinarily large body of tangible and intangible personal property has arisen which has its location and ownership entirely independent of the domicil of the owner. In response to this situation the doctrine of location for taxation of personal property has changed.

One of the earlier cases noting the weakness in the fiction mobilia sequuntur personam and pointing to actual situs as the proper place for taxation was Hoyt v. The Commissioners of Taxes, 24 N. Y. 224. In that case the court said:

"It is said, however, that personal estate by a fiction of law has no situs away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The [fol. 149] necessary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign state.

* * * * * * *

"Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the situs of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule."

The law in this country seems to have developed consonant with the thought contained in that opinion. The Supreme Court of the United States has definitely and unequivocally established the principle that tangible personal property is taxable at its actual situs. Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, and cases cited post. See also Prairie Cattle Co. v. Williamson, 5 Okl. 488, 49 Pac. 937. It holds to the view that taxation by a state of such property having situs outside its boundaries is a violation of the 14th Amendment to the Constitution of the United States. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150. On the other hand, in the field of intangible property the law in most cases, depending upon the circumstances, still holds to the doctrine that such property is taxable at the domicil of the owner. In the Union Refrigerator Transit Co. v. Kentucky case, supra, Mr. Justice Brown, delivering the opinion of the court, said:

[fol. 150] "Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim mobilia sequunter personam, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. (Citations.)

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. * * *"

See 26 R. C. L. p. 282; Notes, 56 Am. Dec. 527, L. R. A. 1915C 914.

The property involved in the case at bar is tangible personalty and would ordinarily fall under the rule which taxes such property at its situs irrespective of the domicil of the owner. However, a prerequisite to the taxation of such property at its situs is that it have a situs, and this property is of a class which in its nature is mobile and may, therefore, move from place to place with such rapidity that it is extremely difficult to assign to it a definite location. While the sovereign has certain jurisdiction over every chattel situated within its territory, not every chattel which happens to be so situated can be regarded as having a taxable situs there. A chattel merely temporarily within the limits is not subject to the ordinary property tax. It [fol. 151] must have become identified with the jurisdiction as a part of its property. See Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091; Kelley v. Rhoads, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259; Robinson v. Longley, 18 Nev. 71, 1 Pac. 377; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup. Ct. Rep. 475; and the cases regarding vessels cited post.

The Supreme Court of the United States has dealt with the problem of jurisdiction to tax this type of property a number of times and a review of some of the decisions sheds much light upon the solution. We are, of course, bound in the present case by its decisions.

In dealing with property of this sort that court has sanctioned the taxation of the fixed value of such property continuously within the state during the taxing period by any method which fairly arrives at that value, although the individual units thereof are constantly changing and are not, as such, identified with the jurisdiction. In Union Tank Line Co. v. Wright (1919) 249 U. S. 275, 63 L. Ed. 602, the court, in considering the proper measure of value for taxation of railway tank cars used in and out of a non-domiciliary state, said:

"A state may not tax property belonging to a foreign corporation which has never come within its borders; to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein,

they may be taxed by the state according to their fair value, along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the tangible value due to what we have called the organic relation of the property in the state to the whole system'. How to appraise them fairly when the tangibles constitute a part of a going concern operating in many states often presents grave difficulties; and absolute accuracy is gen- [fol. 152] erally impossible. We have accordingly sustained methods or appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western U. Teleg. Co. vs. Atty. Gen. (1888) 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall (1899) 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599). But if the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment, or both. Western U. Teleg. Co. v. Atty. Gen., 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961; Marye v. Baltimore & O. R. Co., 127 U. S. 117, 32 L. Ed. 94, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, 35 L. Ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. Ed. 683, 17 Sup. Ct. Rep 305, s. c. 166 U. S. 185, 41 L. Ed. 965, 17 Sup. Ct. Rep. 604; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. Ed. 708, 20 Sup. Ct. Rep. 631; Fargo v. Hart, 193 U. S. 490, 48 L. Ed. 761, 24 Sup. Ct. Rep. 498; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 62 L. Ed. 827, 829, 38 Sup. Ct. Rep. 373."

Two of the cases cited above, American Refrigerator Transit Co. v. Hall (1899) and Union Refrigerator Transit Co. v. Lynch (1900), consider specifically the taxation of cars similar to those involved in the present case by a non-domiciliary state. In these cases the facts are essentially the same. In each the owner was engaged in supplying cars to shippers wherever needed; the cars were not confined to any particular route; were run indiscriminately

over the lines of railroad over which consignors of freight shipped in such cars choose to route them; had no regular intervals nor any regular number; were engaged solely in interstate commerce; and when in the state were only transiently present. The average number within the state dur- [fol. 153] ing the taxing period in the Lynch case was ten cars per day. That case relied heavily upon the authority of the Hall case in which the court said:

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimate for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & O. R. R. Co., 127 U. S. 123; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

The same question was presented in Germania Refining Co. v. Fuller, 245 U. S. 631, 62 L. Ed. 521 (181 Mich. 618) wherein the cars were oil tank cars and the court affirmed the case by memorandum opinion upon the authority of the two cases supra. See also Prairie Cattle Co. v. Williamson, supra, where the Oklahoma Territorial Court sustained a tax on the average theory.

After the decisions in these two cases the question of the power of the domiciliary state to tax the same character of property was presented in the case of Union Refrigerator Transit Co. v. Kentucky (1905), 199 U. S. 195, 50 L. Ed. 150. In that case the cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and [fol. 154] Mexico. The domiciliary state, Kentucky, taxed the entire fleet of 2,000 cars for the years 1897, 1898, 1899,

and 1900. During those years the average number of cars used in Kentucky per day was 28, 29, 40, and 67, respectively. The court treated the tax as one upon "tangible personal property permanently located in other states," and held the same invalid on the ground that the domiciliary state had no power to tax such property. The opinion indicated, however, that Kentucky could have taxed the average used within its borders. It said:

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

No intimation was made, or needed, with respect to where the excess cars were taxable.

Following this case within less than a year the court again passed upon the power of the domiciliary state in the case of New York C. & H. R. R. Co. v. Miller (1906), 202 U. S. 584, 50 L. Ed. 1155. There the state of New York taxed all of the rolling stock of a railroad company although a considerable proportion of it was constantly outside the limits of the state. The relator contended that the proportion constantly outside should be deducted from the New York tax. No showing was made that any specific items were used continuously and exclusively outside of the state during the whole tax year; the court specifically assumed that none were. The court referred to the cases limiting the power of the domiciliary state to tax, including Union Refrigerator Transit Co. v. Kentucky, supra, then said:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every item of that property should be taken successively into [fol. 155] another state for a day, a week, or six months, and then brought back."

Again, in answer to the contention that the present case was but the complement of those cases holding such property taxable in non-domiciliary states, the court said:

"In the present case, however, it does not appear that any specific cars of any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

A consideration of these cases, together with the history of the law on this subject, elucidates some of the principles governing the decisions. When the industrial revolution increased enormously the body of tangible and intangible personal property the maxim mobilia sequuntur personam was already established and the courts followed it until the necessity of taxing personalty at its actual situs became obvious. They then departed from the maxim in favor of the situs, but for the latter to apply the property must have become identified with a jurisdiction other than that of its owner. There remained a class of property for which no situs could be definitely defined. A strong feeling has constantly obtained that no thing of value should escape taxation altogether. So, in such cases, the courts have retained the domiciliary theory. This, it seems, should alleviate the necessity of a court seeking out the most definite of several elusive possible situses and oblige it to uphold a tax only when the property has a defined situs within the taxing jurisdiction. Complementary action of other states should equalize the burdens. Property difficult of location has frequently been held taxable in two states. While the courts have not exhibited squeamishness at this situation, they have, nevertheless, tried on the whole to develop a harmonious system. With respect to property similar to that involved herein Mr. Justice Lurton in [fol. 156] Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, expressed the feeling of difficulty of taxing at the situs as follows:

"To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property."

Such a principle would lead to conflicts in taxation between states and disrupt the harmony of the taxing system as a whole. Unfortunate individuals engaged in legitimate trade between states would suffer hardship. Under certain circumstances the courts have applied the theory of fixed value with changing identity. The items of property do not have a situs within the state but the fixed value is always present. In fairness to that state it should be taxable. Yet, it would be a violation of the very principle upon which the theory is set if the state were allowed to tax a greater amount than the value existing within its borders or to tax where no fixed value really exists. It seems that the minimum should be where there is sufficient average continuously used within the state so that it may be said that the average value is identified with the jurisdiction and the maximum should include only that value. Random excursions of cars into a state in insufficient quantity or with insufficient continuity to create a fixed value identified with the jurisdiction should not justify a tax. In harmony with the feeling that all property should be taxed somewhere such property should be taxed at the domicil of the owner. See New York C. & H. R. R. Co. v. Miller, supra.

In the present case I have no doubt that the average value of the property used in this state is taxable herein. On the other hand, it seems clear that under the decisions cited above much of this property was properly taxable in states other than Oklahoma and another part of it probably had no such definite location as to be taxable at its situs at all. If Oklahoma sustains a tax upon all of the property it has violated the interests of harmony in the taxation of such property. The same is true even if we hold that each item of property has an actual situs in this state, [fol. 157] though I do not say that it would not then all be taxable here. But, I do feel that such consideration should make us reluctant to find that situs. Again, with respect to such part as perhaps has no taxable average elsewhere, we should not try to import a situs by any forced conceptions, on the theory that the most definite situs is in this state, but should yield to the domiciliary jurisdiction.

It is my opinion that each unit of the property involved in this case, that is, each tank car, cannot upon analysis be held to have an actual situs in the State of Oklahoma. Each

car came into and went out of the state during the taxing period. It stayed at the refinery from 24 hours to 10 days each trip. And there were always a greater number out of the state than in its boundaries, so each car must have remained outside the state considerably longer than it did inside. The fact that the cars were used to transport the products of the refinery at Cleveland, that all other points to which they went were haphazard, that they were returnable when empty to Cleveland, that the company repaired them there and maintained storage tracks for them at that place, and that they were always in demand at Cleveland only, does not seem to me sufficient to establish their situs in toto in Oklahoma. These facts are but evidentiary of the essential factor—that each car is as a whole identified with this jurisdiction. There remains the company's purpose to, and the fact that it did, use these cars widely in interstate commerce, that the cars were in fact employed more out of the state than in it. Purpose coupled with action seems to be the controlling principle in assigning a situs to chattels. See Delaware, L. & W. R. Co. v. Pennsylvania, Kelley v. Rhoads, Robinson v. Longley, Brown v. Houston, and Coe v. Errol, all cited supra.

Some of the cases most closely in point in the present situation are the cases decided in the Supreme Court of the United States concerning the situs for taxation of vessels. In the case of Hays v. Pacific Mail S. S. Co. (1855) [fol. 158] 17 How. 596, 15 L. Ed. 254, California laid a tax upon ocean-going vessels. They were owned by a New York corporation and operated by way of Panama to San Francisco, California, and points in the Territory of Oregon. The ships operated on schedule and were in each port long enough to transact their business there. After discharging at San Francisco they proceeded to Benicia, California, where the company maintained a naval dock and a ship-yard for its ships to put in when not otherwise engaged, for repairs, and to await the commencement of the next voyage, usually ten or twelve days. The court held that these ships had no situs for taxation in California.

In Morgam v. Parham (1873) 16 Wall. 471, 21 L. Ed. 303, the vessel operated on a schedule between Mobile, Ala., and New Orleans, La., touching each port about three days per week. The ship was owned by a resident of New York

and was registered in that state. The captain resided in Mobile and a superior agent resided in New Orleans. The ship never went into other waters. The court held the ship, together with others in the same situation, had no situs for taxation in Alabama, and said that such situs was in New York.

In 1905, in Old Dominion S. S. Co. v. Virginia, 198 U. S. 298, 49 L. Ed. 1059, the court held that a ship on navigable waters operating wholly within the state of Virginia but engaged in interstate commerce, had a situs for taxation in that state.

In 1906 it decided Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 50 L. Ed. 1082, wherein vessels and barges operated on inland waters. They were owned in Illinois, had "Paducah, Kentucky" painted on their stern, and when not in use were kept in Paducah. The court held that they had no situs for taxation in Kentucky.

When one compares these cases with the facts in the case at bar it seems to me that we cannot escape the conclusion that each of these cars used into and out of the [fol. 159] state of Oklahoma did not have its taxable situs in this state.

For the foregoing reasons I am of the opinion that the State of Oklahoma has no jurisdiction to tax the entire number of 381 cars owned by the Johnson Oil Refining Company and that a tax so assessed is a violation of the 14th Amendment of the Constitution of the United States. I, therefore, most respectfully dissent.

[fol. 160] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

APPLICATION FOR STAY OF MANDATE—Filed Feb. 2, 1933

Now comes Johnson Oil Refining Company and moves the Court to enter an order staying and withholding the man-

date, or mandates, in the above entitled causes, because it is the bona fide intention of Johnson Oil Refining Company, within the time provided by law, to appeal from the decision of the Court to the Supreme Court of the United States, or to make application to said Supreme Court of the United States for a writ of certiorari, as movant may be advised as to the proper procedure.

Johnson Oil Refining Company, by Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Its Attorneys.

[fol. 161] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

CERTIFICATE OF COUNSEL—Filed Feb. 2, 1933

In connection with the motion of Johnson Oil Refining Company to stay mandate in the above entitled causes, I hereby certify that it is the bona fide intention of Johnson Oil Refining Company to prosecute an appeal from the decision and judgment of this Court in the above entitled causes to the Supreme Court of the United States, or to make proper application to said Court for a writ of certiorari, within three months from and after the overruling by this Court of the petition of Johnson Oil Refining Company for rehearing, and which petition was denied by said Court, and that I believe there is merit in said causes, and that the judgment of the Supreme Court of Oklahoma ought to be reversed by the Supreme Court of the United States.

Dated this 2d day of February, 1933.

A. A. Davidson, Counsel for Johnson Oil Refining Company.

[fol. 162] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

ORDER STAYING MANDATE—Filed Feb. 4, 1933

Motion of Johnson Oil Refining Company for a stay of the mandate herein came on to be heard *heard*:

On consideration whereof, it is now here ordered by the Court that no mandate of this Court issue in the above entitled and consolidated causes until April 1, 1933, and that if within said time Johnson Oil Refining Company shall have perfected an appeal to the Supreme Court of the United States, or if there is filed with the clerk of this Court a certificate of the clerk of the Supreme Court of the United States that a petition for certiorari and record have been filed in that Court, the stay hereinabove granted shall continue until the final decision of said causes in the Supreme Court of the United States.

Done by order of Conference.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

[fol. 163] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23219

[Title omitted]

PETITION FOR APPEAL—Filed March 16, 1933

[fol. 164] Now comes petitioner and appellant, Johnson Oil Refining Company, a corporation organized and existing under and by virtue of the laws of Oklahoma, and represents that on the 20th day of December, 1932, a judgment was rendered by the Supreme Court of Oklahoma in the above entitled and numbered cause, against the petitioner,

in which it avers errors were committed to its prejudice, all of which will more fully appear from the following assignment of errors:

Wherefore petitioner and appellant, considering itself aggrieved by said judgment, prays that it be allowed an appeal therefrom to the Supreme Court of the United States, in order that the errors so complained of may be corrected.

Assignment of Errors

Now comes the appellant above named, and filing herewith its petition for appeal, says that in the record and proceedings, and in the decision in the above entitled cause, manifest error has intervened to the prejudice of your petitioner, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so [fol. 165] construed by the Supreme Court of Oklahoma is repugnant to the Constitution of the United States, particularly the Fourteenth Amendment thereto.

2. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma deprives the appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Oklahoma erred in reversing the judgment of the District Court of Pawnee County, Oklahoma, which held that the tax imposed by the taxing of-

ficials of Pawnee County, Oklahoma, in appellant's entire fleet of cars was a taking of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Oklahoma erred in holding that the assessment of a tax by the taxing officials of Pawnee County, Oklahoma, on the entire fleet of cars of appellant, an Illinois corporation having its principal office and place of business in Chicago, Illinois, was within and authorized by the statute of Oklahoma (Sec. 1, Ch. 44, Session Laws [fol. 166] 1915, p. 64) providing that all property in the State of Oklahoma, except such as is exempt, shall be subject to taxation, and that said statute as so construed was not invalid or repugnant to the Constitution of the United States and the Fourteenth Amendment thereof.

5. The Supreme Court of Oklahoma erred in holding and deciding that the entire fleet of cars had, within the meaning of the statute, an actual taxable situs in the State of Oklahoma, notwithstanding that the cars came into Oklahoma for the sole and only purpose of receiving a load of refinery products for transportation out of the state, and were only temporarily in the state for such purpose, and notwithstanding that none of the cars was kept, laid up, or stored in Oklahoma, but, except for short and unavoidable delays, all the cars were continuously in transit in interstate commerce.

6. The Supreme Court of Oklahoma erred in holding and deciding that appellant's entire fleet of cars was taxable in Pawnee County, Oklahoma, notwithstanding the fact that more than 300 cars of the fleet were, during the years for which the tax was imposed, continuously absent from the state (not the identical cars, but on an average), engaged in the marketing business of the appellant in other states, in which states the cars so engaged in business were taxed.

7. The Supreme Court of Oklahoma erred in holding and deciding that the appellant's entire fleet of railroad tank cars, employed and used by it in the transportation of refinery products out of Oklahoma to not less than 17 other states, for sale there, or in delivery to purchasers in such

[fol. 167] states, and in which states the cars habitually entering therein for such purposes were taxed, was nevertheless taxable in the state of Oklahoma as an entirety, and that such tax was not in violation of the Constitution of the United States, and did not contravene the Fourteenth Amendment thereto.

8. The Supreme Court of Oklahoma erred in refusing to hold and decide that appellant's fleet of cars, shown to have been constantly employed, and in movement, in interstate commerce during the years for which they were assessed, did not and could not thereby acquire an actual situs for taxation in the State of Oklahoma.

Prayer for Reversal

By reason whereof, and for which errors petitioner and appellant, Johnson Oil Refining Company, prays that the judgment and decision of the Supreme Court of Oklahoma be reversed and judgment rendered in favor of the said appellant, and for costs.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant, Johnson Oil Refining Company.

[fol. 168] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23219

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 16, 1933

[fol. 169] The appellant in the above cause having prayed for the allowance of an appeal therein to the Supreme Court of the United States from the final judgment made and entered therein by the Supreme Court of Oklahoma on the 20th day of December, 1932 (petition for rehearing having been duly filed and thereafter denied on January 31, 1933), and from each and every part thereof, and having

presented and filed its petition for appeal, and its assignment of errors with prayer for reversal, and upon due consideration thereof and of the record in said cause:

It is ordered that said petition for appeal be, and is hereby, granted, and that an appeal from the judgment of the Supreme Court of Oklahoma in said cause be, and is hereby, allowed, to the Supreme Court of the United States, upon petitioner filing an appeal bond in the sum of one thousand dollars, with sufficient sureties, and conditioned that appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make good its said plea.

It is further ordered that the Clerk of the Supreme Court of Oklahoma shall prepare and certify a transcript of the record, proceedings, and judgment, in said cause, and transmit the same to the Supreme Court of the United States.

The said appellant now presenting a bond in the sum of one thousand dollars, with United States Fidelity and Guaranty Company as surety, it is ordered, that the said bond be, and the same is hereby, approved.

In witness whereof, I have set my hand this 16th day of March, 1933.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

Attest:

Gus Pool, Clerk Sup. Ct., by Reuel Haskell, Jr., Dep.

(Seal.)

[fols. 170–172] Bond on appeal for $1,000, approved and filed March 16, 1933, omitted in printing.

[fol. 173] IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed March 21, 1933

To the State of Oklahoma ex rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma:

There is hereby served upon you, as appellees, by copies thereof, the petition for appeal by Johnson Oil Refining Company, the assignment of errors filed therewith, and the order allowing appeal, in the above entitled cause.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Appellant.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for Appellees.

[File endorsement omitted.]

[fols. 174–188] Citation in usual form, showing service on W. T. Cleeton and E. W. Clark, filed March 16, 1933, omitted in printing.

[fol. 189] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

PRÆCIPE FOR RECORD—Filed March 21, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to prepare and certify a transcript of the record in the above entitled cause, for the use of the Supreme Court of the United States, by including therein the following:

1. Petition in error and case-made attached thereto as Exhibit "A".
2. Motion to consolidate the cause with causes 23,218, 23,334 and 23,342.
3. Order of consolidation.

4. Minute of submission.
5. Minute of judgment.
6. Majority opinion of the Supreme Court.
7. Petition for rehearing.
8. Order denying petition for rehearing.
9. Dissenting opinion of Justice Swindall on rehearing
10. Motion for stay of mandate and certificate of counsel.
11. Order staying mandate.
12. Petition for appeal.

[fol. 190] 13. Assignment of errors.

14. Order allowing appeal.
15. Bond on appeal.
16. Service of petition for appeal, assignment of errors and order allowing appeal.
17. Citation and service thereof.
18. Statement in support of jurisdiction under Rule 12 of the Supreme Court of the United States, and service thereof.
19. This præcipe.
20. Certificate of Clerk.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 18th day of March, 1932.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[fols. 191–206] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed March 31, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to include in the transcript of the record in the above entitled cause, in addition to the matters included in the original præcipe, the following:

Appellee's statement against jurisdiction under paragraph 3, rule 12 of the rules of the Supreme Court of the United States, and service thereof.

This præcipe.

J. A. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 31 day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[fol. 207] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 208] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S DEFINITE STATEMENT OF THE POINTS UPON WHICH IT RELIES AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 7, 1933

[fol. 209] Statement of Points Relied On

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The statute of the State of Oklahoma, Section 9574 of the Compiled Statutes, 1921, providing,

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation,"

as construed and applied by the Supreme Court of Oklahoma in its judgment and opinion, and so as to bring within its provisions, as to taxability, appellant's fleet of cars, is repugnant to the Constitution of the United States in that it contravenes the Fourteenth Amendment thereto as depriving appellant of its property without due process of law.

Point 2. As, upon the undisputed facts, appellant, an Illinois corporation, was at all times engaged, in the State of its domicile, in the business of marketing refined petroleum products in interstate commerce; that the cars assessed were an investment in, and a facility of such business; that they were at all times employed in commerce among the states; that they came to Oklahoma as an incident to such commerce, and were temporarily within the [fol. 210] borders of the state, for the sole purpose of receiving a load of refined petroleum products, principally at appellant's refinery in Pawnee County, Oklahoma, for transportation out of the state, and for delivery in other states, either to appellant's customers, or for sale at its own bulk stations maintained in a number of states; that each car was in the State of Oklahoma for such purpose, on an average, about two days per month; that more than four-fifths of the number of cars, on an average, were continuously out of the State of Oklahoma, employed in their owner's business in other states, and in which states they were taxed, and the taxes thereon were paid; and that as no part of the fleet of cars had ever been laid up or stored, the fleet of cars was not property within the jurisdiction of the State of Oklahoma for taxation purposes, and the assessment of the entire fleet contravened the Fourteenth Amendment to the Constitution of the United States, as claimed by appellant.

Point 3. The domicile of the owner, as an Illinois corporation, furnished, prima facie, the situs of its fleet of cars for the purpose of ad valorem taxation, and the fact that cars of the fleet came habitually to appellant's refinery in Pawnee County, Oklahoma, to be loaded with interstate merchandise for transportation out of the state, and for such purpose only, did not operate to change such situs, or authorize the taxing authorities in Oklahoma to assess a

tax thereon, and such tax contravenes the Fourteenth Amendment to the National Constitution.

[fol. 211] Point 4. The continuous movement of appellant's cars, both within and without the jurisdiction of Oklahoma, in interstate commerce, and for the transportation of refinery products from Oklahoma to, and for the distribution thereof in, other states, cannot operate to fix a situs for the entire fleet at the location of appellant's refinery, or at any other place, in the State of Oklahoma.

Point 5. The judgment of the Supreme Court of Oklahoma that the taxable situs of appellant's fleet of cars was at its refinery in Pawnee County, Oklahoma, is in conflict with the undisputed facts and the legal effect thereof, and with the fundamental basis of taxation, and the assessment of a tax thereon deprived appellant of its property without due process of law.

Point 6. The legal situs of the cars at the domicile of appellant, and in other states where they are employed and where they have been taxed, presumably in proportion to the protection afforded them by the laws of such states, precludes, upon established principles of taxation, the right of Oklahoma to levy a tax upon the entire assessable value of the entire fleet, in that the State is not called upon to protect, and cannot, upon the undisputed facts, afford the protection of its laws to, the entire fleet.

Point 7. The Supreme Court of Oklahoma committed reversible error in affirming the judgment of the County [fol. 212] Court of Pawnee County, Oklahoma, and in thereby denying the claims of appellant to the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States.

Designation of Parts of Record to be Printed

The appellant states that it considers only the following parts of the record necessary for consideration of the points upon which it intends to rely:

Pages 1 to 10, both inclusive.
Pages 18 to 19, both inclusive.
Page 20.

Beginning with page 33, and continuing to the 5th line of page 42, ending with the words "That is all".

Beginning on page 45 with the words "G. C. Lilly (recalled)", and continuing to the 13th line of page 46, ending with the words "That is all".

Beginning on page 49 with the words "Direct Examination: Mr. Clark", to the 14th line of page 51, ending with the question and answer, "Q. And it is considered accurate? A. Yes."

Beginning with the 18th line on page 52 with the words "Cross Examination by Mr. Davidson", and continuing to page 53, including the first six lines on said page.

Beginning on page 57 with the words "G. C. Lilly being recalled, in open court deposes and says," and continuing to the bottom of page 83.

[fol. 213] All of pages 95 and 96.

Beginning with page 107, and continuing to and including page 116.

Print the remaining part of the record from pages 121 to 207, both inclusive.

Respectfully submitted.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant.

We hereby acknowledge service, by copy, of the foregoing and agree thereto this 31st day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel; J. Berry King, Attorney General of Oklahoma, by F. M. Dudley, Assistant Attorney General of Oklahoma, Attorneys for Appellees.

[fol. 214] [File endorsement omitted.]

Endorsed on cover: File No. 37,541. Oklahoma Supreme Court. Term No. 23. Johnson Oil Refining Company, Appellant, vs. The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al. Filed April 7, 1933. No. 23, O. T., 1933.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 844

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provisions Sustaining Jurisdiction.

The jurisdiction of this Court on appeal from the Supreme Court of Oklahoma is invoked by reason of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344) having reference to appellate jurisdiction of the decrees of State courts by writ of error:

> "* * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

And the Act of January 31, 1928 (Ch. 14, 45 Stat. 54) abolishing the writ of error and providing that all relief which theretofore could be obtained by a writ of error shall thereafter be obtainable by appeal, and by the act of April 26, 1928 (Ch. 440, 45 Stat. 466) with reference to such appeals.

B.

Statute of the State of Oklahoma, the Validity of Which Is Involved.

The statute of Oklahoma, the validity of which as construed by the Supreme Court of Oklahoma, involved in this case is Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921), which reads as follows:

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

C.

Date of the Judgment Sought to Be Reviewed, and Date Upon Which Application for Appeal Was Presented.

The judgment of the Supreme Court of Oklahoma, which is sought to be reviewed, was entered on December 20, 1932 (R. 129).

A petition for rehearing was duly filed and was denied by said court on January 31, 1933 (R. 145). The application for appeal to the United States Supreme Court was presented to the Supreme Court of Oklahoma on March 16, 1933, and allowed on March 16, 1933 (R. 168).

D.

Nature of Case and Rulings Below.

The above cause, and the judgment therein, involves the validity of an assessment for taxation by the taxing officers of Pawnee County, Oklahoma (amounting to over $756,000) of a fleet of approximately 380 tank cars belonging to appellant, Johnson Oil Refining Company, for the year 1928, as property not listed for taxation for said year.

Appellant is a corporation of the State of Illinois, engaged in the marketing of refined petroleum products, and which business is conducted at its domicile. It is admitted that the cars are engaged in interstate

and intrastate commerce, and are used by the Johnson Oil Refining Company to transport its products from its refinery in Pawnee County, Oklahoma, to various points within and without the State in pursuance of its marketing business. It is further admitted that about ninety-nine per cent of the use of the cars was in interstate business; that each car was in the state, on an average, of about two days per month, and that they came into the State for the sole purpose of receiving a load of refinery products. Nevertheless, the entire assessable value of the entire fleet was held taxable by the Supreme Court of Oklahoma under the Oklahoma statute above referred to.

The case originated under a statute of Oklahoma, being Chapter 38, Article III, Session Laws 1909, p. 626, as amended by Chapter 189, Session Laws of 1915, p. 386 (Article XIII, Chapter 84, Oklahoma Statutes 1921, p. 3235), providing a procedure for the assessment by county treasurers of property not listed and assessed, and providing for an appeal from the action of the county treasurer to the County Court of the County, and from said court to the Supreme Court of Oklahoma. The county treasurer of Pawnee County, over appellant's objection that he was without jurisdiction, assessed the entire fleet of cars of Johnson Oil Refining Company for the years 1925, 1926, and 1927 (R. 20). On appeal to the County Court of Pawnee County, and at the trial of the cause, Johnson Oil Refining Company specifically objected to the proposed assessment for taxation on its entire fleet of cars as unconstitutional, as depriving it of due process

of law, and as contravening the Fourteenth Amendment to the Constitution of the United States (R. 34). Notwithstanding such objection, the County Court confirmed and approved the assessment of the county treasurer, and, notwithstanding a motion for new trial on the ground that the decision of the court deprived appellant of its rights claimed under the Fourteenth Amendment to the Constitution of the United States, entered such judgment (R. 113), and Johnson Oil Refining Company appealed to the Supreme Court of Oklahoma, assigning as error that the judgment of the county court deprived Johnson Oil Refining Company of its property without due process of law and in contravention to the Fourteenth Amendment to the Constitution of the United States (R. 1).

The cause was consolidated in the Supreme Court, by order of that court, with three other causes on appeal from the County Court of Pawnee County, the District Court of Pawnee County, and the County Court of Osage County, Oklahoma (R. 127), being Nos. 23,219, 23,334, and 23,342 in the Supreme Court; each of which involved the validity of a like assessment on the same cars, and all of which consolidated causes, and the record therein, were considered and decided by the Supreme Court of Oklahoma in the same opinion (R. 130).

The Supreme Court of Oklahoma held that the entire fleet of cars was taxable in and by Pawnee County, Oklahoma, for the years specified, and affirmed the judgment of the County Court of Pawnee County, Oklahoma (R. 130).

In pursuit of the company's marketing business, the cars habitually entered 17 different States during the course of a year, in which States they were taxed according to value, and the tax thereon was paid (R. 67-81-82). Such tax was, presumably, in accordance with the right of the States to so tax them under appropriate legislation, as repeatedly held by the Supreme Court of the United States.

Eidman v. *Martinez,* 184 U. S. 578;
American Refrigerator Co. v. *Hall,* 174 U. S. 70;
Pullman Palace Car Co. v. *Pennsylvania* 141 U. S. 18;
Union Refrigerator Co. v. *Lynch,* 177 U. S. 149.

The record further shows that the property of Johnson Oil Refining Company, including its tank cars, is taxed at its domicile in Illinois, upon a valuation of its entire property which has not paid taxes elsewhere (R. 69).

It is the contention of appellant that the Statute of Oklahoma (Sec. 1, Ch. 44, Session Laws 1915, p. 64; Sec. 9574 C. O. S. 1921) as construed and applied by the Supreme Court of that State is unconstitutional, and that under Section 237 of Judicial Code, amended (U. S. C. A. Title 28, Sec. 344), Act of January 31, 1928 (Ch. 14, 45 Stat. 54) and Act of April 26, 1928 (Ch. 440, 45 Stat. 466) this court has jurisdiction by appeal.

Said statutes apply not merely in cases where the validity of a State statute in its bare words is drawn into question, but also in cases where the validity of

the statute *as construed* by the highest court of the State is brought into question.

In determining the problem of the right of appeal in such cases the statute as presented to this Court in the record must be read just as though there were included in its language to the effect that the tank cars, such as these involved and used in the instant case should be taxed in full by the State of Oklahoma.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

In *Knights of Pythias* v. *Meyer*, 265 U. S. 30, this Court said with reference to the construction of a Nebraska statute:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the State legislation as though such meaning had been specifically expressed therein."

In *Appleby* v. *City of New York*, 271 U. S. 364, this Court entertained jurisdiction on writ of error and reversed a judgment of the highest court of the State of New York, which had construed certain statutes of that State in such a manner that they contravened the Constitution of the United States. The statutes in question did not specifically, in so many words, cover

the situation, but needed construction. In stating the case Justice Taft pointed out, page 366, that the highest court of New York upheld the statutes of New York and enforced them in such a way as to impair the obligation of the plaintiff's deed in violation of Section 10 of Article One of the Federal Constitution. In his opinion Justice Taft says, page 379:

> "The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has interpreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.
>
> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the State court?"

In *Ward & Gow* v. *Krinsky*, 259 U. S. 503, this Court took jurisdiction on writ of error in a case where the New York Court construed a New York statute and upheld it as so construed. This Court said, page 510:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the State law adopted by its court of last resort; * * *. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon State action."

In *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, the Supreme Court of Illinois upheld the validity of

an Illinois statute on the particular construction placed upon it by that court. This Court took jurisdiction on a writ of error. The Court said, page 509:

> "It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning; but it is not true that this Court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis Southwestern Railway* v. *Arkansas,* 235 U. S. 550, at page 362, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:
>
> " 'Upon the mere question of construction we are of course concluded by the decision of the State court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court. We must regard the substance, rather than the form and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.' "

In *Alabama Railway Co.* v. *Jackson Ry. Co.,* 271 U. S. 241, this Court on writ of error reversed a decision of the State court which construed and upheld a statute of the State of Alabama.

In *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76, this Court entertained jurisdiction on a writ of error of a case in which the Court of Appeals of Kentucky upheld a tax on certain lines of railway under a statute of the State, and reversed the State court's construction and application of the statute.

See also:

Anglo-Chilean Nitrate Sales Corp. v. *Alabama*, —U. S. —, No. 377, October Term, decided February 6, 1933;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board*, — U. S. No. 51, October Term, 1932, decided December 5, 1932.

Bryant v. *Zimmerman*, 278 U. S. 63;

Alpha Cement Co. v. *Massachusetts*, 268 U. S. 203.

We therefore respectfully submit that this Court has jurisdiction.

CHAS. Y. FREEMAN,
J. A. McCOLLUM,
PRESTON C. WEST,
A. A. DAVIDSON,
Attorneys for Appellant.

(3236)

FILE COPY

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CHARLES ELMORE CR
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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932

No. [redacted] 23

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

J. BERRY KING,
Attorney General of Oklahoma,
F. M. DUDLEY,
W. T. CLEETON,
ED. WAITE CLARK,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 844

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

The appellee, in support of its assertion of belief that there exists in the above entitled case no grounds

of jurisdiction for review by this court, and also for grounds of dismissal, respectfully represents:

Jurisdiction of review is sought to be established by appellant, on the grounds of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344), quoted under "A" of appellant's statement, as follows:

> "* * * Where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Oklahoma Statute asserted (under "B" of appellant's statement) to have been drawn in question on the ground of its being repugnant to the Constitution of the United States, is Section 9574, Compiled Oklahoma Statutes of 1921; which reads as follows:

> "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

Relief under Section 237 of the Judicial Code is sought upon the theory, as set out on pages six and seven of appellant's statement, that this Court will accept the interpretation placed upon the Oklahoma statute by the Supreme Court of Oklahoma; and that the Supreme Court of the State of Oklahoma has interpreted Section 9574, C. O. S. 1921, in such a manner as to make it contravene the 14th Amendment of the

Constitution of the United States; thus giving this Court jurisdiction.

Under this doctrine, this Court is asked to "read into the Statute" the interpretation of the Oklahoma Supreme Court:

> Citing: *Knights of Pythias* v. *Meyer*, 264 U. S. 30; *Appleby* v. *New York*, 271 U. S. 364; *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494; *Alabama Railway Co.* v. *Kentucky*, 274 U. S. 76, and other cases referred to but not discussed.

Under the cases cited by appellant to the effect that this Court will accept the State court's interpretation of a State statute, it is apparent that this Court will look only to that interpretation, as shown by the decision of the State court.

Inasmuch as this Court will not, for purposes of determining jurisdiction, review the State court's determination as to the *facts* in the case a review of contentions in the State court as to the facts has no place in this statement.

The Supreme Court of Oklahoma, in its decision of December 20, which is set out in full, attached hereto, marked Exhibit "A", after reciting that no *ad valorem* tax was paid on the cars in Illinois, the domicile of the Company, uses the following language:

> "Section 9574, C. O. S. 1921 (C. O. S. 1931, Sec. 12317), provides:
>
> " 'All property in this state, whether real or personal, including the property of corpora-

tions, banks and bankers, except such as is exempt, shall be subject to taxation.'

"A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

"The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation owns but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky,* 96 Ok. 256, 222 Pac. 527. *State* v. *Timbrook's Est.*, (La.) 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Okla. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast,* (Mo. App.) 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute 'property within the State'. They are merely temporarily absent at times from Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars is taxable in Pawnee County. *Prairie Cattle Co.* v. *Williamson,* 5 Ok. 488, 49 Pa. 937."

In holding no cars taxable in Osage County, the Court further said:

> "In our opinion these cars did not have a permanent abiding place within Osage County, and were not subject to taxation otherwise than in Pawnee County."

As we conceive it, the above is the interpretation to which this Court will look.

The Supreme Court of Oklahoma interprets Section 9574, C. O. S. 1921, to tax property which has an actual situs, a permanent abiding place, within the State.

In the language of this Court in *Coe* v. *Errol, infra,* in considering the right of a State to subject to taxation all personal property having an actual situs within its borders, "It is hardly necessary to cite authorities on a point so elementary."

> "The right of the State, in which personal property is situated, to tax it, is not affected by the fact that the owner resides in another State, which taxes him for the same property as a part of his general estate attached to his person. *Coe* v. *Errol,* 116 U. S. 517."

To the same effect:

Pullman's Palace Car Co. v. *Pennsylvania,* 141 U. S. 18.

St. Louis v. *Wiggins Ferry Co.,* 11 Wall. 423.

Savings & Loan Soc. v. *Multnomah County,* 169 U. S. 421.

Frick v. *Pennsylvania,* 268 U. S. 473.

The Supreme Court of Oklahoma found the actual situs to be in Pawnee County and the property, for that reason, there taxable in accordance with Sect. 9574, C. O. S. 1921. Surely this Court will not, in considering jurisdiction, go behind that finding of fact on the part of the State Court.

> "As to whether a tax is in accordance with a law of a State, the decision of the highest Court of a State is conclusive." *Pullman Palace Car Co.* v. *Pennsylvania,* 141 U. S. 23.
>
> "We said in *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 451, 33 Sup. Ct. 329, 57 L. Ed. 591, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See, also, *Foreman* v. *Meyer,* 227 U. S. 452, 33 Sup. Ct. 331, 57 L. Ed. 594. If there be no dispute about the facts, *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state." *Ireland* v. *Woods,* 246 U. S. 323.

The appellant's contention of the unconstitutionality of Section 9574, C. O. S. 1921, was not urged upon the Trial Court nor upon the State Supreme Court.

WHEREFORE, for the reasons afore set forth, appellee respectfully moves the court to dismiss this appeal for lack of jurisdiction.

J. BERRY KING,
Attorney General of the State of Oklahoma.
F. M. DUDLEY,
Assistant Attorney General.
W. T. CLEETON,
County Attorney of Pawnee County, State of Oklahoma.
ED. WAITE CLARK,
Special Counsel.

EXHIBIT "A."

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 23,218.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23,219.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23,342.

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY.

Error from the District Court of Pawnee County, State of Oklahoma.

Honorable Thurman S. Hurst, Judge.

Reversed and Remanded.

No. 23,334.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Osage County, State of Oklahoma.

Honorable Henry Wood, Judge.

Reversed.

SYLLABUS.

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed. Waite Clark, P. E. Rowe, R. K. Robertson, for Pawnee County.

C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig, for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, for Johnson Oil Refining Company.

RILEY, *J.*:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferrett. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in interstate and intrastate commerce. By the use of them the Johnson Oil Refining Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This ac-

commodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seem to be the result of sales contracts made from the office at Chicago. O. C. Goward is the superintendent of transportation for the refinery, whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs. They are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no *ad valorem* tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S. 1921, provides:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that

despite the fact it listed for taxation in Pawnee County 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky,* 96 Okla. 256, 222 P. 527; *State* v. *Timbrook's Est.,* 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast,* 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. *Williamson* v. *Prairie Cattle Co.,* 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage

County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage County and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J., Herner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J., Andrews, J., absent.

This opinion, together with dissenting opinion of Swindall, J., on rehearing, not here attached, not yet officially reported, but reported in 19 Pacific, 2d Series, page 168.

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1933

No. 24

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA

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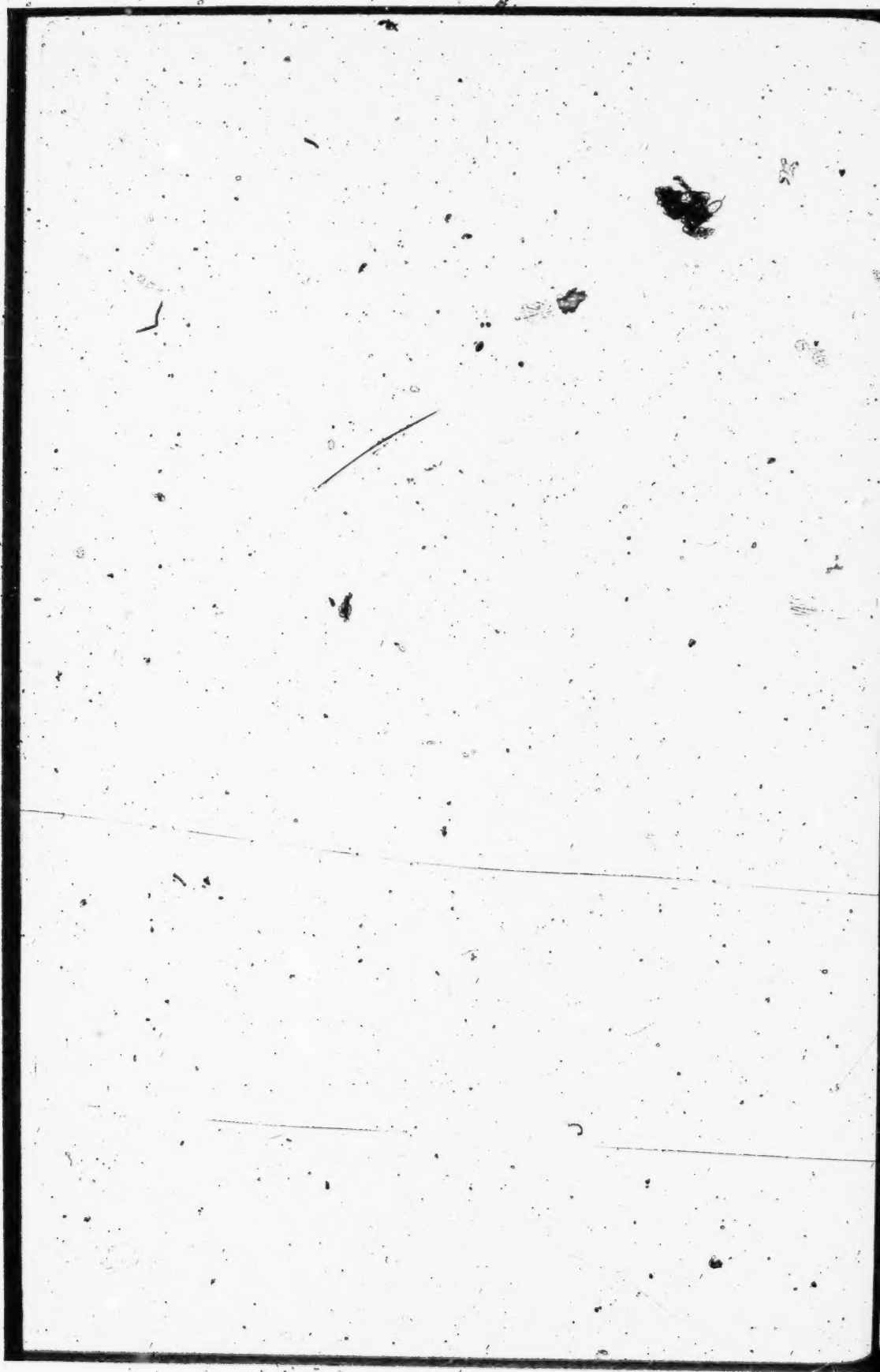

[fol. 1] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23342

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, a Corporation, Defendant in Error,

or

In re Appeal in the Matter of the Assessment and Valuation of the Property of JOHNSON OIL REFINING Co., a Corporation

PETITION IN ERROR—Filed Feb. 4, 1932

Comes now the plaintiffs in error, appellants and represent and show to the court that heretofore, to-wit; on the 26th day of October, 1931, in the District Court of Pawnee County, Oklahoma, the District Court of Pawnee County, Oklahoma, rendered a judgment reversing and modifying the judgment of the Board of Equalization of Pawnee County, Oklahoma, in a certain action and proceeding, wherein there was involved the assessment of certain tank cars belonging to the Johnson Oil Refining Co., a corporation.

[fol. 2] The Johnson Oil Refining Co., a corporation, having filed its return of personal property with the county assessor of Pawnee County, Oklahoma, listing its property for the year 1931, and along with its other property it listed 64 tank cars at $500.00 per car, amounting to $32,000. Thereafter, and on June 24, 1931, the Board of Equalization of Pawnee County, Oklahoma, increased its assessment by adding 317 tank cars thereto and duly notified the Johnson Oil Refining Co. to appear before the Board of Equalization on July 8, 1931, and show cause why such assessment should not be so increased or adjusted. That, thereafter,

the Johnson Oil Refining Company filed its response, and the case was set down for hearing, and after various continuances, a decision was rendered by the Board of Equalization of Pawnee County, on July 28, 1931, increasing the number of said tank cars from 64 to 381, and thereby adding 317 tank cars and assessed the whole 381 tank cars at $500.00 per car, or at $190,500.00.

That an appeal was duly taken by the Johnson Oil Refining Company from the decision of the Board of Equalization of Pawnee County, Oklahoma, to the District Court of Pawnee County, Oklahoma, and the decision of the Pawnee County Board of Equalization was reversed and modified to the extent of holding that only 64 tank cars were assessable and taxable in Pawnee County, Oklahoma, at $32,000 for 1931, and not 381 tank cars at $190,500. That Pawnee County and the State of Oklahoma have appealed from the judgment of the District Court of Pawnee County, Oklahoma, to the Supreme Court of this State, and a certified transcript of the record and case made, duly certified and [fol. 3] attested is hereto attached and made a part hereof, and the plaintiffs in error allege that there is error in said record and proceedings in this, to-wit:

1st. That the court erred in overruling the motion of the Board of Equalization for a new trial.

2nd. That the court erred in holding that only 64 tank cars were assessable for taxation.

3rd. That the court erred in striking from the assessment 317 tank cars.

4th. That the court erred in not holding that the entire 381 tank cars were assessable for taxation for 1931.

5th. That the court erred in holding that the entire 381 tank cars were not assessable and taxable in Pawnee County for 1931:

6th. That the judgment is contrary to the law and evidence.

7th. That the court erred in reversing and modifying the judgment and decree of the Board of Equalization of Pawnee County, Oklahoma.

Wherefore Plaintiffs in Error pray that the judgment be reversed and this court render judgment holding that the whole fleet of 381 tank cars are assessable and taxable in Pawnee County, Oklahoma.

C. E. Mitchell, Co. Atty.; L. V. Orton, Attorneys for Appellant.

[fol. 4] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

CROSS-PETITION IN ERROR—Filed Feb. 11, 1932

Now comes Johnson Oil Refining Company, designated as defendant in error in the above entitled cause, and by this its cross petition in error, shows to the court that by virtue of a proceeding instituted before the Board of Equalization of the County of Pawnee, Oklahoma, and pending in the District Court of Pawnee County, Oklahoma, upon appeal from said County Board of Equalization, under the caption, "In the Matter of the Proposed Assessment and Valuation of Property of Johnson Oil Refining Company," No. 8035, a judgment was rendered on October 26, 1931, by the said district court as set out in the petition in error herein filed, and as shown by the original case-made and transcript of the proceedings in said cause in said district court in which said judgment was rendered, attached to and marked Exhibit "A" of the petition in error, and which is by reference made a part of this cross petition in error.

And the said Johnson Oil Refining Company avers that there is error in the said record of proceedings and in said judgment rendered against it, and from which defendant in error appeals, to-wit:

[fol. 5] 1. The judgment of said District Court of Pawnee County is contrary to law.

2. The court erred in not holding and deciding that the property assessed for taxation was taxable only at the domicile of its owner, to-wit, the State of Illinois, and in not holding and deciding that no part of same was taxable within the State of Oklahoma.

3. The judgment of the District Court of Pawnee County is not supported by the evidence which wholly fails to show

that the cars of Johnson Oil Refining Company, or any of said cars, were located and had an actual situs for taxation in Pawnee County.

4. The conclusion and judgment of the court that a portion of the tank cars of Johnson Oil Refining Company was subject to taxation in the State of Oklahoma and in Pawnee County, is contrary to law, in that said cars were, as shown by the evidence, property beyond the territorial jurisdiction of the State and that such judgment constituted a taking of the property of Johnson Oil Refining Company without due process of law, hence in violation of the Fourteenth Amendment to the Constitution of the United States.

5. The judgment of the court is contrary to the undisputed evidence, which established that the cars assessed were the property of a non-resident corporation, domiciled in the State of Illinois, used and employed by it in the transportation of merchandise in interstate commerce and in the course of its marketing business, conducted by, and from its office in the State of Illinois, and that said cars were only temporarily in Pawnee County and in the State of Oklahoma on such business, and have no abiding place therein.

[fol. 6] 6. The judgment of the court is contrary to law because the proof showed the cars assessed for taxation were only temporarily in the State of Oklahoma and in Pawnee County and upon interstate business, and that they had no location, or abiding place, therein, and had no actual situs for the purpose of taxation in said county and state, there being no statute of the state fixing a situs for such cars, or any portion thereof upon the basis of an average of such cars physically present in said Pawnee County, but were in transit therein in the conduct of interstate business.

7. The court erred in construction of the statute of Oklahoma providing for the taxation of all real and personal property in the state, and in holding and adjudging that the cars of Johnson Oil Refining Company were property having a situs in Pawnee County for the purpose of taxation within the meaning of said statutes, which said construction of the statute would render the same unconstitutional in that it would impute to the Legislature an

attempt to tax a non-resident's property outside the jurisdiction of the state, and in disobedience of the due process clause of the Fourteenth Amendment to the Constitution of the United States.

9. The judgment of the court is contrary to law as neither the State of Oklahoma, as such, nor any of its political subdivisions or taxing districts, has the power or authority to tax the cars of Johnson Oil Refining Company, or any of them, which said cars were shown by the evidence to be only temporarily present in the state and for a purpose wholly inconsistent with an indefinite stay therein, to-wit, for receiving an interstate load of refinery products, remaining in said state for such purpose not more than twenty-four hours at a time, and coming into the state approximately only eighteen times, or eighteen days, in the course of one year, and consequently were constantly out of the state [fol. 7] for the remaining 347 days of the year, and the imposition of such tax is therefore without authority of law and amounts to the taking of property of Johnson Oil Refining Company without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

10. The court erred in failing and refusing to adjudge that the tank cars of Johnson Oil Refining Company were the property of a non-resident of the State of Oklahoma in transit in Pawnee County and therefore not subject to taxation in said state.

11. The court erred in holding, ruling and deciding that the Board of Equalization of Pawnee County had jurisdiction and authority to make an assessment for taxation, and to tax, the tank cars of Johnson Oil Refining Company upon the basis of a daily average number of its cars physically present in Pawnee County, Oklahoma and which cars were shown to be in transit in said county as vehicles of, and engaged in, interstate commerce.

Wherefore Johnson Oil Refining Company prays that said judgment be reversed and that it be restored to all things it has lost by reason thereof.

West, Gibson, Sherman, Davidson & Hull, McCullum & McCullum, Attorneys for Johnson Oil Refining Company.

[fols. 8-21] EXHIBIT "A"

IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Case-made—Filed Jan. 12, 1932; filed in Supreme Court Feb. 4, 1932

[File endorsement omitted.]

[fol. 22] Transcript of Proceedings Before the County Board of Equalization of Pawnee County, Oklahoma, in the Matter of the Proposed Assessment and Valuation of Property of Johnson Oil Refining Company

BEFORE COUNTY BOARD OF EQUALIZATION OF PAWNEE COUNTY

NOTICE OF PROPOSED ASSESSMENT

Pawnee, Okla., June 24th, 1931.

Johnson Oil Refining Company, Cleveland, Oklahoma:

You are hereby notified that the County Board of Equalization of Pawnee County, Oklahoma, by authority of Law, has adjusted your assessed valuation for 1931 Taxes as follows:

We have listed 381 tank cars at $700.00 per car, amounting to $266,700.00. This is in lieu of your listing of 64 cars at $500.00 per car, amounting to $32,000.00.

This adds 317 cars at $700.00 per car or $211,900.00 and adds $200.00 per car to the 64 cars you listed or $12,800.00 or a total raise in assessment of $244,700.00.

You may appear before said Board July 8, 1931, at the Court House in Pawnee, Oklahoma, and show cause why [fol. 23] such assessment shall not be increased or adjusted.

Pawnee County Board of Equalization. L. V. Orton, Chairman. George Baker, Member. D. B. Hollar, Member. C. E. Davies, Assessor. J. M. Perry, County Clerk.

[fol. 24] BEFORE BOARD OF EQUALIZATION OF PAWNEE COUNTY, OKLAHOMA

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

RESPONSE

To the Honorable Equalization Board of Pawnee County, Oklahoma:

The undersigned, Johnson Oil Refining Company, in response to your notice directed to it and bearing date of June 24th, 1931, files this its response to the proposed assessment of its property for the year specified in said notice, for the following reasons:

1. That it appears from the matters set forth in said notice, that your Honorable Board is without jurisdiction to hear and determine any questions involved therein, or to make said proposed assessment.

2. Because the said notice fails to describe the property proposed to be assessed and fails to mention the location thereof.

3. Because the undersigned is a foreign corporation, having its principal office in the State of Illinois, and that its moneyed capital invested in Oklahoma is represented by fixed tangible property in this State, and in the various counties thereof, which has been duly listed and returned for assessment and taxation in the counties where the same is taxable under the laws of the State.

4. Because the undersigned is a foreign corporation transacting business and owning property in various states of the Union, and that the Statute of Oklahoma authorizing a tax upon corporations upon the capital, surplus, and undivided profits does not apply to the undersigned which has paid all taxes imposed, levied, or assessed upon that portion of its property located in the State of Oklahoma, [fol. 25] and which property for the year 1931 has been duly listed and returned for assessment and taxation in the counties where the same is taxable under the laws of the State.

5. Because the undersigned does not have or own property in this State other than that which has been duly listed and returned for assessment and taxation in the counties of this State where the same is taxable under the laws of the State, and that it does not own any moneyed capital, surplus, or undivided profits in this State apart from the fixed property and assets located and remaining wholly within the State, which fixed property has been listed and returned for assessment and taxation in the counties where the same was taxable under the laws of the State.

6. Because the property mentioned in said notice is listed and returned for assessment and taxation in other states, and to assess and tax the same in the State of Oklahoma is double taxation.

7. Because the property mentioned in said notice is owned by a foreign corporation and is used in interstate commerce and is not located within the State of Oklahoma, and such property has no situs within the County of Pawnee, and is not subject to assessment and taxation by the State of Oklahoma, or any subdivision thereof.

Wherefore Johnson Oil Refining Company prays that this response be considered, and that such proposed assessment be disallowed and denied.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Its Attorneys.

[fol. 26] BEFORE BOARD OF EQUALIZATION OF PAWNEE COUNTY, OKLAHOMA

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY, said Proposed Assessment Being on 387 Tank Cars, the Property of JOHNSON OIL REFINING COMPANY, for the Year 1931

AGREED STATEMENT OF FACTS

This statement of facts is prepared and agreed to by and between C. E. Mitchell, County Attorney, Pawnee County, Oklahoma, representing Pawnee County, Okla-

homa, and A. A. Davidson and McCollum and McCollum, attorneys, representing Johnson Oil Refining Company, witnesseth:

It is agreed:

1st. That C. E. Mitchell is the duly elected, qualified and acting County Attorney of Pawnee County, Oklahoma, and is the attorney in this matter representing the interests of Pawnee County, before the Board of Equalization of Pawnee County, and as such county attorney, has full power to enter into this agreed statement of facts.

2nd. It is further agreed and stipulated that this agreed statement of facts, together with any oral testimony introduced herein by Johnson Oil Refining Company or Pawnee County, Oklahoma, at this hearing shall be considered as testimony and evidence given at this hearing and as such, shall constitute a part of the transcript of the pro-
[fol. 26½] ceedings at this hearing.

3rd. That this agreed statement of facts may be used by either the State of Oklahoma, or any subdivision thereof, particularly Pawnee County, or the said Johnson Oil Refining Company, in any proceedings before the said Board of Equalization, or any appeal taken therefrom the same as if such facts were testified to by witnesses, and both the County Attorney, C. E. Mitchell, and the attorneys for the said Johnson Oil Refining Company, agree to waive any and all objections based on incompetency, immateriality, or irrelevancy, it being agreed and understood that the said board of equalization, or any court to which these proceedings may be appealed, may consider this entire statement as evidence in the case.

4th. It is agreed that up to March 14th, 1931, the said Johnson Oil Refining Company was an Illinois corporation, domiciled in the State of Illinois, with its principal offices located in the City of Chicago; that since March 14th, 1931, said company has been a Delaware corporation, maintaining its principal office in the city of Chicago; that at no time has said company been a domestic corporation; that the said company owns and operates a crude oil refinery at Cleveland, Oklahoma; that the Cleveland refinery is the only refinery owned and operated by said company; that among other property owned by said company are three

hundred eighty-seven (387) tank cars; that said tank cars are used by said company in transporting refined products from the Cleveland refinery to the various points of delivery throughout the United States; that said cars are used in inter-state commerce, and none of said cars are employed wholly in intra-state; that in transporting the refined products from the Cleveland refinery, said cars may [fol. 27] enter any state in the Union, and frequently enter the following named states:

Arkansas, Colorado, Kansas, Michigan, Mississippi, Nebraska, North Dakota, Ohio, South Dakota, Wisconsin, Indiana, Iowa, Missouri, Louisiana, Illinois, and Oklahoma;

That said cars are sometimes loaded at refineries located in states other than Oklahoma, and the load transported in said cars to points of delivery, either in the state in which they are thus loaded, or other states. That in returning to Cleveland, Oklahoma, to be reloaded, said tank cars remain either on the private tracks of said company, or the tracks of the Missouri, Kansas and Texas Railroad Company, and remain on said tracks for a short period of time only, ranging from twenty-four (24) hours to about ten (10) days, depending upon the season of the year, and the volume of products handled out of the Cleveland refinery. That each of said cars make about one and one-half (1½) trips per thirty (30) days. That is, each car is loaded at the Cleveland refinery, sent to the point of delivery, returns to the Cleveland plant, is reloaded and sent out again to a point of delivery each thirty (30) days. That each car is out of Pawnee County and the State of Oklahoma from twenty (20) to twenty-nine (29) days out of each month; That with each shipment, through the bill of lading, the [fol. 28] consignee is instructed to return the car, when emptied, to Cleveland, Oklahoma, and all railroads handling said cars are instructed to return all empty cars to Cleveland, Oklahoma, unless otherwise specifically directed by the Johnson Oil Refining Company, which is sometimes done for the purpose of loading said cars at some other refinery, as hereinbefore stated. Said cars are repaired at Cleveland, Oklahoma, when such cars are repaired by the Johnson Oil Refining Company. That the daily average number of cars within Pawnee County during the years

1929 and 1930, was sixty-four (64), leaving a daily average of the total number of cars outside of Pawnee County during said time, three hundred twenty-three (323). In other words, about sixteen (16) per cent of the number of cars owned by said company, on a daily average, are in Pawnee County, and about eighty-four (84) per cent, on a daily average, are somewhere in transit outside of Pawnee County.

5th. That said tank cars are returned to Cleveland, Oklahoma, only for the purpose of reloading; that the Missouri, Kansas and Texas Railroad Company, in handling said cars, frequently places the empties on its own tracks; there they remain until called for by the Johnson Oil Refining Company, and when on the tracks of such railroad company, said cars are under the care and control of said railroad company, except such empty cars cannot be diverted from the service of the Johnson Oil Refining Company, and must be held by said railroad company subject to the needs of said refining company.

6th. That when a car is in transit and demands repair, the railroad company then handling such car makes the necessary repairs, sends the bill therefor to the Cleveland Office where it is approved or disapproved. If approved, [fol. 29] the bill is then transmitted to the Chicago office, out of which office the check or voucher is sent directly to the railroad company entitled to the same. Where the repair work is done by the Johnson Oil Refining Company at Cleveland, all bills for labor and material are approved by the Cleveland office, transmitted to the general office at Chicago, and the check or voucher mailed by the general office either to the Cleveland office for distribution, or directly to the person or concern furnishing such material or labor. That said company keeps and maintains at Cleveland, Oklahoma, a supply of repair materials, such materials, when purchased, are paid for out of the general office at Chicago, but the Cleveland office has the right and authority to use such materials as they deem necessary for the purpose of repairing said cars, and the Cleveland office has the right and authority to purchase such materials as said office deems necessary, either for immediate repair or for the purpose of placing in the warehouse. Provided, however, the payment of the same is made out of the

general office at Chicago, upon the request and approval of the Cleveland office.

7th. It is agreed that in returning empty cars, if the same are stopped short of Cleveland, Oklahoma, and placed on tracks at other points, such handlings of said cars is at the suggestion of the railroad company, and not the Johnson Oil Refining Company, and said cars are so handled solely for the convenience of said railroad company.

[fol. 30] Johnson Oil Refining Company introduced the following testimony:

(Mr. GARNETT C. LILLY, first witness, being duly sworn on oath to testify the truth, the whole truth and nothing but the truth, testified as follows:)

(Judge A. A. Davidson, one of the attorneys representing Johnson Oil Refining Company, questioned the witness.)

Q. State your full name.

A. Garnett C. Lilly.

Q. Where do you live, Mr. Lilly?

A. Chicago, Illinois. My residence is at 200 Wood Court, Chicago, Illinois.

Q. What, Mr. Lilly, is your connection with the Johnson Oil Refining Company?

A. I am Secretary and Treasurer.

Q. And have occupied that position for how many years?

A. Two years. Prior to that time I was, for thirteen years, Assistant Secretary.

Q. Mr. Lilly, up to March 14th, 1931, the Johnson Oil Refining Company was an Illinois corporation, was it not?

A. Yes, sir, up until March 14th, 1931, it was an Illinois corporation.

Q. Mr. Lilly, has it, the Johnson Oil Refining Company, surrendered its Illinois Charter?

A. All of the assets of the Illinois corporation have been transferred to a new corporation organized in Delaware, but the Illinois charter has not yet been surrendered.

Q. And that new corporation was incorporated March 14th, 1931, and has the same name as the old?

[fol. 31] A. Yes, sir.

Q. Up until March 14th, 1931, the principal office of the Johnson Oil Refining Company was in Chicago, Illinois?

A. Yes, sir.

Q. And that, Mr. Lilly, is still its main business office?

A. Yes, sir.

Q. And the business office of the new corporation?

A. Yes, sir, that's right.

Q. It has been stipulated here that the fleet of tank cars owned by the corporation are used in inter-state commerce and none of said cars are employed wholly in intra-state commerce. Now, Mr. Lilly, what would you say was the proportion of cars that might be used in shipping your gasoline in the same state?

A. In the same state?

Q. Yes, sir, in the State of Oklahoma.

A. A very small proportion, I would say.

Q. Well—just what proportion would you say?

A. I don't know. I do not have any figures that I could make an estimate—but just a very small proportion.

Q. All of the cars are employed in inter-state commerce, are they not, Mr. Lilly?

A. Yes, sir.

Q. Shipment to other states outside of the State of Oklahoma?

A. Yes, sir.

Q. Now, it has been stipulated also that in returning cars to Cleveland to be reloaded, they remain on the private tracks of your Company or on the tracks of the Missouri, Kansas and Texas Railroad for a short period of time. How long?

[fol. 32] A. Ranging from twenty-four (24) hours to about ten (10) days.

Q. Depending upon the season and the volume of business?

A. Yes, sir.

Q. Mr. Lilly, can you tell us how long they remain on your private tracks for reloading purposes?

A. Twenty-four (24) hours.

Q. That is to say, that when a car comes in on your private track for reloading purposes, it takes twenty-four hours to get out again?

A. Yes, sir.

Q. Are these cars, Mr. Lilly, necessary to the operation of your refinery?

A. No, sir.

Q. They are not, in any way, a plant facility?

A. No, sir.

Q. I take it that the company could lease cars for the purpose of shipping gasoline?

A. That's right.

Q. Your company is engaged in the marketing business also, is it not?

A. Yes, sir.

Q. Aside from the refining end?

A. Yes, sir, that's right.

Q. Are these cars used in the marketing business?

A. Yes, sir.

Q. Between states?

A. Yes, sir.

Q. Now, Mr. Lilly, how is your property taxed in the State of Illinois?

[fol. 33] A. Well—there are two systems of taxation. One, an ad valorem tax based on the value of the property and the other a capital stock tax.

Q. What is included in that capital stock tax? Just how is it?

A. A sum is assessed equal to the difference between the total of the capital and surplus account and the total of all ad valorem tax assessed values of physical properties in all states.

Q. Does your company pay taxes on the tank cars in other States of the Union?

A. Yes, sir.

Q. Do you know what States?

A. I think I can tell you the most of them. They are Missouri, Kansas, Wisconsin, Michigan, Indiana, Ohio, North and South Dakota, Nebraska, Colorado, Iowa, Mississippi and Arkansas.

Q. Louisiana?

A. We have been, but not recently.

Q. Including Illinois, of course?

A. Yes, Illinois, under the capital stock tax.

Q. Now, what is the basis of that tax you pay in the other states?

A. In all of the cases that have come to my attention, the tax is based on an ad valorem or value per car except in Minnesota and Wisconsin beginning with the year 1931.

Q. Based on what, Mileage?

A. Yes, the mileage travelled by the cars in these States is how they measure the number of cars in the State per year.

Q. So as I understand you then, that the taxes are assessed on the average cars in the state and not on the individual cars?

A. That's right.

[fol. 34] Q. Now, you say this mileage travelled is used to ascertain the average number of cars in the State?

A. Yes, sir.

Q. Please explain more fully.

A. For example, in the State of Nebraska, cars are said to make an average of 100 miles per day, that is one car is said to make that and the total mileage of all cars in that State divided by 100 would give the number of cars required to be in that State for one day. For ten days the annual tax would be 1/365ths of 10. That is for ten cars a day, not a year.

Q. Have they a definite system in Minnesota and Wisconsin?

A. In Minnesota, I think it was in 1926, they changed their law to a tax on the earnings of the cars in that State.

Q. And the taxes are paid on that basis?

A. The tax is paid by the railroads and held out of the mileage rents due us. Wisconsin has just passed a new law in 1931 taxing cars on that same basis.

Q. Heretofore, what was the system?

A. Ad valorem tax.

Q. Now, what kind of cars are these your company owns?

A. Steel tank cars. No insulated cars.

Q. How old are they?

A. Over ten (10) years, all of them.

Q. Now, Mr. Lilly, where are the repairs made on these cars?

A. Minor repairs are made at the plant in Cleveland, Oklahoma. Cars in transit, are repaired by the railroad companies when necessary.

Q. Is there a repair shop at Cleveland?

A. No.

[fol. 35] Q. Just ordinary repairs?

A. Yes, just ordinary side track repairs.

Q. When the cars need other repairs, where are they sent?

A. Usually to the Tulsa or Coffeyville, Kansas, shops of the North American Car Company.

Q. But as I understand you, these cars are constantly on the move?

A. Yes, sir, every day.

Q. They have no home or no locality?

A. No, sir.

Q. Is the Cleveland Refinery the only refinery that you own?

A. Yes, sir.

Q. Do you buy gasoline anywhere else?

A. Yes, sir.

Q. Is that also for inter-state shipment?

A. Yes, sir.

Q. Now, it is loaded then at Cleveland at your refinery and shipped out to whom?

A. A great majority of shipments are made to our own stations in States of Illinois, Indiana, Ohio, Missouri and Wisconsin.

Q. What do you mean by your own stations?

A. Bulk stations.

Q. Some, I take it then, are to customers and purchasers?

A. Yes, sir.

Q. And that is true with practically all of the cars that you own, is it not?

A. Yes, sir.

Q. When do the cars come back in your possession for loading purposes, on your private tracks?

A. Not until required.

[fol. 36] Q. When required, do you ask the railroad company to deliver you a certain specified number of cars?

A. Yes, sir.

Q. And these cars in the railroad's possession are strung our anywhere?

A. Right.

Q. Not your concern?

A. No, sir.

Q. Then, what railroad are your cars shipped on at Cleveland?

A. The Missouri, Kansas & Texas, exclusively.

Q. Now, as I understand it, your company pays taxes on all of its permanent and fixed property in Pawnee County?

A. We do.

Q. The tank cars are not a local investment, are they?

A. No, sir.

Q. You state that these cars do a marketing business as well as being used for shipments for your refinery. Explain what you mean by that.

A. Gasoline and other petroleum products are often purchased from other refineries and other cars sent to their plant for loading.

Q. You say there is just the one refinery. Have you any other?

A. Yes, a lubricating oil plant at Chicago Heights, Illinois.

Q. Are these same cars used for shipping purposes from your lubricating plant?

A. Yes, occasionally.

Q. Those shipments made outside the State of Illinois.

A. Yes, sir.

[fol. 37] Q. Do you know the value of the cars, Mr. Lilly?

A. I don't feel that I do.

Q. Have you sold any lately?

A. No, nor bought any.

Q. I believe that is all.

(Mr. C. E. Mitchell, County Attorney of Pawnee County, representing Pawnee County, cross-examines the witness, Mr. Lilly.)

Mr. Mitchell:

It is hereby stipulated and agreed that the following notation appears in the July, 1931, Official Railway Equipment Registry at page 970, among other statements:

"Total 387 cars; report mileage and movements to G. A. Mindeman, Traffic Manager, Cleveland, Oklahoma; send bills for repairs to cars and make remittances to the Johnson Oil and Refining Company, Cleveland, Oklahoma."

It is agreed that those statements are relative to the Johnson Oil Refining Company.

Q. Mr. Lilly, you have testified that your only refinery is at Cleveland, Oklahoma?

A. Yes, sir.

Q. And that you have 387 cars. Tank cars?

A. Yes, sir.

Q. Now, each one of those cars come to the refinery at Cleveland anywhere from four, to possibly fifteen times a year or more, on an average?

A. Yes, sir.

Q. Now, on all of your tank cars, they bear a marking which says in substance, 'When empty, return to Johnson Oil and Refining Company, Cleveland, Oklahoma'?

[fol. 38] A. Yes, sir.

Q. The Katy Railroad and your company, both, have some trackage at Cleveland?

A. Yes, sir.

Q. And during the slack season in your business, more cars are apt to be on the tracks in Cleveland than during the busy season?

A. No. The track storage is usually full every day.

Q. What is the track capacity in Cleveland?

A. About sixty-five (65) cars.

Q. That is, the Johnson Oil Refining Company load them?

A. Yes, sir.

Q. Now, you stated that some times you ship tank cars of lubricating oil from the Chicago plant?

A. Chicago Heights plant.

Q. That is a very rare instance?

A. Yes, sir.

Q. Are you acquainted with the repairing facilities that your Company have at Cleveland?

A. No, I can't say that I am qualified to explain that for certain.

Q. You do know, however, that some repairing is done at Cleveland?

A. Yes, sir.

Q. You do not at this time, pay any tax on your tank cars in Oklahoma?

A. No, sir.

Q. And have not?

A. No, not for several years.

Q. You don't keep any cars in Chicago, other — when you need them?

A. No, sir.

[fol. 39] Q. The cars are all billed back to Cleveland unless otherwise ordered to another point?

A. Yes, sir.

Q. Do you use any other cars other than your own in transporting your goods?

A. Yes, we use relief cars.

Q. How many?

A. From twenty-five to one hundred and fifty.

Q. Depending on the season of the year?

A. Depending on the season of the year and the volume to be moved.

Q. You purchase quite a bit of oil at Cushing, and load it from there?

A. We have done so in the past.

Q. You sometimes ship a load or a tank car of gasoline from the Cleveland plant to some other point within the State of Oklahoma?

A. Yes, sir.

Q. But you do not have any specified cars for that purpose?

A. No, sir.

Q. You do not have any other billings on your cars specifying the returning point other than the plant at Cleveland?

A. No, sir.

Q. I believe that is all.

(Mr. L. V. Orton, Chairman of the Equalization Board of Pawnee County, questions the witness, Mr. Lilly.)

Q. Mr. Lilly, in 1930, what valuation did any of the other States place upon any of these tank cars?

A. From six hundred to twelve hundred dollars per car.

[fol. 40] Q. Did you pay, in 1930, any ad valorem tax on any of these cars?

A. In any State?

Q. Yes, sir.

A. Yes, sir.

Q. I understood you to say that the other States handled them about the same way Nebraska did?

A. So far as the cases that have come under my knowledge they do with the two exceptions that I have given you. That being Minnesota and Wisconsin.

Q. Then Minnesota and Wisconsin made you pay in 1930, a regular ad valorem tax on some of these tank cars?

A. No, the Minnesota tax is a percentage or earnings based on the mileage travelled in that State in 1930. Assessment in Wisconsin is an ad valorem tax but they have changed their law, effective in 1931, to an earnings tax.

Q. Then it was Wisconsin that valued the sum six hundred to twelve hundred dollars for 1930?

A. No, the six-hundred valuation I gave you is placed on the cars by Arkansas; the twelve hundred valuation, by Nebraska, and other States range mostly between those two figures.

Q. So far, for the year 1931, you haven't paid any taxes on these tank cars, have you?

A. In other States?

Q. Yes, for the year 1931?

A. They are not assessable until the end of the year.

(C. E. Mitchell, County Attorney, again takes the witness.)

Q. Mr. Lilly, the State of Illinois does not levy an ad valorem tax on tank cars?

A. Not directly.

[fol. 41] Q. Do you know what license tax you pay in the State of Oklahoma?

A. Approximately eighteen hundred to two thousand dollars per year.

Q. You are referring to foreign corporations?

A. Yes, sir.

(Mr. L. V. Orton takes the witness.)

Q. Did you ever resist the payment of any of the taxes on the tank cars in other States upon the ground that they probably were taxable in Oklahoma?

A. No.

Q. Or any other State?

A. No.

Q. You did pay the State of Oklahoma, tax on these cars, didn't you?

A. Based on mileage and earnings.

Q. Up to when?

A. About four years ago. I think about that time.

Q. And the State Auditor is still insisting that you pay that tax?

A. No, sir.

Q. He is writing about it?

A. He sends us a bill occasionally.

(Judge A. A. Davidson questions witness.)

Q. This direction for the return of the cars is merely a standing direction to the railroads unless specific orders are given to divert the cars to some other place?

A. Yes, sir.

Q. The Johnson Oil Refining Company was in business [fol. 42] before the purchase of this refinery at Cleveland and had tank cars then?

A. Yes, sir.

Q. The County Attorney asked you if you kept any cars in Illinois?

A. Right.

Q. He asked you about a shipment—say from one point in Oklahoma to another point in Oklahoma of some products. That is just occasionally?

A. Occasionally.

Q. The cars, in fact, are used for inter-state shipments?

A. Yes, sir.

(It is agreed then that the table at the conclusion of Paragraph No. 10 of the Agreed Statement of Facts is a correct statement of the taxes paid in the various States referred to for the fiscal year- 1929 and 1930.)

State	Year	Amount
Arkansas	1929	$14.36
"	1930	8.56
Colorado	1929	12.01
"	1930	10.89
Kansas	1929	693.07
"	1930	719.82
Michigan	1929	185.59
"	1930	303.75
Mississippi	1929	.....
"	1930	13.57
Nebraska	1929	89.27
"	1930	84.55

State	Year	Amount
North Dakota	1929	.20
"	1930	1.56
Ohio	1929	167.08
"	1930	86.70
South Dakota	1929	4.21
"	1930	3.84
West Virginia	1929	.....
"	1930	3.05
[fol. 43] Wisconsin	1929	144.03
"	1930	170.75
Indiana	1929	254.01
"	1930	224.00
Iowa	1929	199.55
"	1930	167.80
Missouri	1929	548.05
"	1930	851.34
Louisiana	1929	2.87
"	1930	.....

(Mr. JOHN SCHEIDEL, next witness, is sworn on oath to testify the truth, the whole truth, and nothing but the truth.)

(Judge A. A. Davidson, one of the attorneys representing the Johnson Oil Refining Company, questions witness.)

Q. State your name, your full name, please.

A. John Scheidel.

Q. What is your business, Mr. Scheidel?

A. I am Superintendent of the North American Car Corporation.

* * * * * * *

[fol. 44] Q. Has your company made repairs on these cars?

A. I have repaired considerable Johnson cars.

Q. Where are the large repairs made?

A. Coffeyville, Kansas and Tulsa.

Q. No repair shop at Cleveland?

A. A repair shop to make what we call light repairs in order to take care of the safety required by the inter-state commerce commission.

Q. But not equipped to take care of all repairs?

A. No. No machinery. They can only drive a few rivets and tighten up bolts.

Q. Just a shipping point there?

A. All refineries have a few men at their loading tracks to make safety appliance repairs.

[fols. 45-47] Q. You stated that you had repaired several of the Johnson Oil Refining cars. Tank cars?

A. Yes, sir.

Q. Where do you send your bills for payment for repairs that you make on those cars?

A. Direct to Chicago.

Q. Do you send any bills to Cleveland?

A. No, sir.

Q. Where do you receive your check from?

A. Chicago.

Q. Who orders the repairs made?

A. The Traffic Manager at Cleveland, Oklahoma.

[fol. 48] (GEORGE A. MINDEMAN, next witness, sworn on oath to testify the truth, the whole truth, and nothing but the truth, testified as follows:)

(Mr. J. A. McCollum, one of the attorneys for Johnson Oil Refining Company, questions the witness.)

Q. State your name in the record, please.

A. George A. Mindeman.

Q. You are employed by the Johnson Oil and Refining Company?

A. Yes.

Q. In what capacity?

A. Traffic Manager.

Q. How long have you been employed in that line of the work?

A. Thirteen years.

Q. As traffic manager, is it your duty to supervise the movement of the tank cars in the usual course of the company's business?

A. Yes, sir.

Q. What per cent of the cars, if you know, is employed in interstate shipments or commerce?

A. I would say, about ninety-nine per cent.

Q. Leaving one per cent for intra-state shipments?

A. Yes, sir.

Q. Is there any one particular car or group of cars set aside for any particular shipments, either intrastate or interstate?

A. No, excepting that we have cars for gasoline loading, kerosene loading, cars for gas oil and fuel oil. You see we [fols. 49 & 50] can't interchange unless we clean them. For instance, if we have cars in fuel oil service and we wanted to use them for gas, we necessarily would have to first clean them.

Q. That classification of the cars has nothing whatever to do with the routing of the cars?

A. No, sir.

[fol. 51] Q. Now, the M., K. & T. Railroad Company does not have sufficient trackage in Cleveland to bring all the cars you have empty to come in?

A. They may and may not, depends on how our cars are rolling, and in what volume.

Q. Now the cars that you have on your trackage are under your direct supervision and control at Cleveland?

A. At Cleveland, yes.

Q. So far as routing is concerned?

A. That is right.

Q. And, as a matter of fact so far as Osage or Parsons, Kansas, is concerned, it would be immaterial to your company whether they were left on the siding at Parsons or Osage or brought down to Cleveland?

A. I don't quite understand you.

Q. In other words, as far as your company is concerned, it would be more satisfactory to your company to have the railroad to bring the cars right in Cleveland and keep them there for your immediate use than for some to be at Osage or Parsons and for you to have to order them?

A. Possibly, that is true.

Q. Of course, that pertains to the empty-s coming back to Cleveland?

A. Yes, sir.

Q. The full cars that happen to be on the sidings at Osage and Parsons are going out probably to some other States.

A. That is right.

Q. And it is your desire to get them to their destination as quickly as possible?

A. That is right.

[fols. 52–54] Q. So the cars that are on the sidings other than at Cleveland, they are more for the railroad's convenience than for your company?

A. That is right.

Q. If there were sufficient trackage of your company's, it would be the desire of the company to have all the empty-s sent directly to the plant at Cleveland so you would have them ready to use as they were needed?

A. I believe that is a fair statement.

Q. And the cars then that are on the sidings at Osage and Parsons are merely in transit either from your refinery or to the refinery?

A. Yes, sir.

Q. That is all.

(Mr. L. V. Orton takes the witness.)

Q. You don't direct the railroad company, do you, to store your cars at Parsons or Osage?

A. No, sir.

(Mr. C. E. Mitchell, County Attorney, again takes witness.)

Q. But if they are there then you order them as you need them?

A. We call them and tell them we want so many cars each day.

(Judge A. A. Davidson questions Mr. Lilly.)

Q. Mr. Lilly, in purchasing tank cars, where are they purchased?

A. In Chicago.

Q. All contracts for the purchase of tank cars are made in Chicago and paid for in Chicago?

A. Yes, sir.

Q. That is all.

(The evidence is closed on behalf of the Johnson Oil Refining Company.)

[fol. 55] BEFORE BOARD OF EQUALIZATION OF PAWNEE COUNTY, OKLAHOMA

In re Assessment of JOHNSON OIL REFINING COMPANY, a Corporation

JOURNAL ENTRY OF JUDGMENT—July 28, 1931

This matter coming on for hearing on the 24th day of June, 1931, wherein the Board of Equalization of Pawnee County, Oklahoma, had under consideration, the Tax Assessment, or return filed by the said Johnson Oil Refin-

ing Company, a corporation, for 1931, and on said date the number of tank cars belonging to said corporation, and listed in its assessment, was raised from sixty-four (64) tank cars to three hundred eighty-one (381) tank cars, and the valuation of the sixty-four (64) tank cars listed by said corporation as $500.00 per car to $700.00 per car, and 317 tank cars added by the Equalization Board was assessed at $700.00 per car, and due and legal notice was given to said Johnson Oil Refining Company, a corporation, and said corporation was ordered to show cause why the assessment as charged and raised by the Equalization Board should [fol. 56] not stand, and the matter was set for hearing for July 8th, 1931, and notice was duly given by mailing notices to the office of the corporation at Cleveland, Oklahoma, and notice given in person by J. A. McCollum, attorney for the corporation, in Pawnee, Oklahoma, and a notice mailed to the office of the said corporation in Chicago. That on said 8th day of July, 1931, the Johnson Oil Refining Company, appeared by its attorneys, McCollum & McCollum, filed its response, and by agreement, the matter was continued until the 25th of July, 1931, at 9 o'clock A. M. of said day.

On said 25th day of July, 1931, the matter came on for trial before the Board of Equalization of Pawnee County, Oklahoma. The Johnson Oil Refining Company was present by some of its officers, and by A. A. Davidson and J. A. McCollum, its attorneys, and Pawnee County was represented by C. E. Mitchell, County Attorney, and all parties announced themselves ready for the hearing. Whereupon the evidence was introduced by both sides, and by agreement, the testimony was taken down in shorthand by Gladys Lehew, a stenographer, to be transcribed and certified to by her. The evidence being completed, and the case argued by the attorneys, the case was taken under advisement until July 28th, 1931, when all the members of the Board of Equalization were present, and each side were represented by their attorneys, and the said Board being in regular session, the said Board of Equalization finds and decides that the said assessment, as given and filed by the Johnson Oil Refining Company, listing sixty-four (64) tank cars at $500.00 per car, should be raised to 381 tank cars, at $500.00 per car, so that the assessment of said Johnson Oil Refining Company, as to the 64 tank cars at $500.00 per car or $32,000.00, there is added 317 tank cars at

$500.00 per car or $158,000.00, so that the total assessment [fol. 57] of the tank cars of the said corporation is raised from $32,000.00 to $190,500.00.

The said Board finds that said corporation owns 381 tank cars and they are a part of the equipment of said Johnson Oil Refining Company and that their situs for taxation is in Pawnee County, Oklahoma, and that they are used in connection with its refinery at Cleveland, Oklahoma, for the purpose of shipping its refined products from Cleveland, Oklahoma, to various points in the United States.

It is therefore, by the Board of Equalization, ordered and adjudged that the assessment of said Johnson Oil Refining Company, a corporation, be raised from 64 tank cars to 381 tank cars, and that it be assessed for taxation on 381 tank cars at $500.00 per car, or $190,000.00, for the fiscal year beginning July 1st, 1931, and ending June 30th, 1932, on said tank cars.

To the above, the Johnson Oil Refining Company excepts, and gives notice of its intention to appeal to the District Court of Pawnee County, Oklahoma.

L. V. Orton, Chairman of the Board of Equalization, Pawnee County, Oklahoma.

[fol. 58] BEFORE EQUALIZATION BOARD OF PAWNEE COUNTY

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

NOTICE OF APPEAL

To L. V. Orton, Chairman of the Board of Equalization of Pawnee County, Oklahoma; C. E. Davies, County Assessor of Pawnee County, Oklahoma; J. M. Perry, County Clerk of Pawnee County, Oklahoma, and C. E. Mitchell, County Attorney of Pawnee County, Oklahoma:

You, and each of you, are hereby notified that the Johnson Oil Refining Company intends to, and does hereby, appeal from the decision of the Equalization Board of Pawnee County, Oklahoma, rendered July 28th, 1931, to the district court of Pawnee County, Oklahoma, in which decision the board held that three hundred eighty-one (381) tank cars owned by the Johnson Oil Refining Company are taxable in Pawnee County for the year 1931, and held [fol. 59] that such tank cars should be assessed at $500.00 each.

You are further notified that the Johnson Oil Refining Company appeals from such decision for the reasons and on the grounds, as follows, to-wit:

1. That the Equalization Board is without jurisdiction to hear and determine any question involved in these proceedings, and is without jurisdiction to make said assessment.

2. Because the Johnson Oil Refining Company is a foreign corporation having its principal office in the State of Illinois, and because said company's moneyed capital invested in Oklahoma is represented by fixed tangible property in Oklahoma, and in the various counties thereof, which property has been duly listed and returned for assessment and taxation in the counties where the same is taxable under the laws of the state.

3. Because the Johnson Oil Refining Company is a foreign corporation transacting business and owning property in various states of the Union, and that the Statute of Oklahoma authorizing a tax upon corporations, upon the capital, surplus, and undivided profits, does not apply to the undersigned, which has paid all taxes imposed, levied, or assessed upon that portion of its property located in the State of Oklahoma, and which property, for the year 1931, has been duly listed and returned for assessment, and taxation in the counties where the same is taxable under the laws of the state.

4. Because the Johnson Oil Refining Company does not have or own property in this state other than that which has been duly listed and returned for assessment and taxation in the counties of this state where the same is taxable under the laws of the state, and said company does not own any moneyed capital, surplus, or undivided profits in this state apart from the fixed property and assets located and remaining wholly within the state, which fixed property has been listed for assessment and taxation in the counties where the same is taxable under the laws of the state.

5. Because the tank cars sought to be assessed by said Equalization Board are listed and returned for assessment and taxation in other states, and to assess and tax the same in the State of Oklahoma is double taxation.

6. Because the tank cars sought to be assessed and taxed by said board are owned by a foreign corporation and are used in interstate commerce, and are not located within the State of Oklahoma, and enter Pawnee County only in [fols. 60–62] transit, and such property has no situs within the county of Pawnee, and is not subject to assessment and taxation by the State of Oklahoma, or any sub-division thereof.

7. That said tank cars are not commingled with other personal property in the state; that each car is separately and specially numbered and lettered, so that its identity is at all times fixed and determinable; that the Johnson Oil Refining Company asserts that none of said tank cars are subject to assessment and taxation in Pawnee County.

Wherefore Johnson Oil Refining Company prays that the attempted assessment of said tank cars by the Board of Equalization of Pawnee County, be set aside and held for naught.

Johnson Oil Refining Company, by West, Gibson, Sherman, Davidson & Hull and McCollum & McCollum, Its Attorneys.

Service of the foregoing notice accepted this 1st day of August, 1931.

L. V. Orton, Chairman Board of Equalization of Pawnee County, Oklahoma. C. E. Davies, County Assessor, Pawnee County, Oklahoma. J. M. Perry, County Clerk of Pawnee County, Oklahoma. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[fol. 63] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In re Assessment of Property of JOHNSON OIL REFINING COMPANY

JOURNAL ENTRY OF JUDGMENT—Oct. 26, 1931

Now, on this 26th day of October, 1931, the same being a regular court day of the September, 1931, term of the above court, this matter coming on before me, Thurman S.

Hurst, a Judge of the above District Court, on the transcript of proceedings before the County Board of Equalization of Pawnee County, Oklahoma, made as provided by law, and upon the issues of law arising thereon, and the court having heard the arguments of counsel, and being fully advised in the premises, concludes and holds that the objection of Johnson Oil Refining Company to the assessment of said cars insofar as three hundred seventeen of the total number of cars, should be sustained; that said three hundred seventeen cars did not acquire a situs in [fol. 64] the State of Oklahoma, and are not subject to taxation in Pawnee County, or in the State of Oklahoma, and that such taxation would be an interference with interstate commerce, and that it would amount to a talking of said property without due process of law and in violation of the Fourteenth Amendment to the Constitution of the United States.

The court further concludes and holds that the objection of Johnson Oil Refining Company to said assessment should be denied insofar as sixty-four of said cars is concerned, and concludes and holds that said sixty-four cars, being the average number present in Pawnee County, Oklahoma, on any one day during the year 1930, and being the number of said cars listed by Johnson Oil Refining Company for taxation in Pawnee County, Oklahoma, for the year 1931, was property in the State of Oklahoma, and in Pawnee County, and within the purview of the statute providing for the taxation of all personal property within the state, not exempt by law, and that said number of cars had a situs in Pawnee County, Oklahoma, and were taxable in said county.

It is therefore considered, ordered and adjudged by the court that the action of the Board of Equalization of Pawnee County, in assessing the tank cars of Johnson Oil Refining Company be, and the same is hereby annulled and set aside, insofar as said assessment relates to an excess of the number of said cars over sixty-four, and the assessment made by said County Board of Equalization is hereby modified so that said assessment shall be, and be spread on the assessment roll of Pawnee County, in the sum of Thirty-two Thousand ($32,000.00) Dollars, instead of One Hundred Ninety Thousand ($190,000.00) Dollars, to-wit: on sixty-four cars at a value of $500.00 each.

[fol. 65] Johnson Oil Refining Company excepts to the ruling and judgment of the court, that the daily average number of its cars present in Pawnee County, Oklahoma, during the year 1930, are taxable by said Pawnee County, and gives notice in open court of its intention to appeal therefrom.

The County Attorney of Pawnee County, Oklahoma, excepts, on behalf of the State of Oklahoma, and Pawnee County, Oklahoma, to the ruling and judgment of the court, that the number of cars belonging to Johnson Oil Refining Company in excess of sixty-four cars, have no situs for taxation in the State of Oklahoma, and that such taxation would be in violation of the Fourteenth Amendment to the Constitution of the United States, and gives notice in open court of the intention of said State of Oklahoma, and Pawnee County, to appeal from such judgment.

Upon the request of the parties the court clerk is directed to enter said notice of appeal upon the proper docket in accordance with the statutes in such cases made and provided for.

And for good cause shown, each of the parties hereto are given and granted an extension of thirty days from this date to make, and serve, for appeal, a record and case-made of the proceedings and judgment herein, upon the opposing party, who shall have ten days after service thereof to suggest amendments thereto, said case-made to be settled and signed upon five days' notice by either party.

It is further ordered by the court that said judgment be, and the same is hereby stayed and superseded pending the perfection of an appeal, by either party, and thereafter [fols. 66-70] until said appeal is finally determined.

Thurman S. Hurst, Judge of the District Court.

Filed in the District Court of Pawnee County, Oklahoma, Nov. 28, 1931.

Jos. D. Soulsby, Court Clerk, by Ethel Traver, Deputy.

Which said proceedings were entered upon the minute book of the Court Clerk by direction of the Court in said cause, to-wit:

* * * * * * *

[fol. 71] IN DISTRICT COURT OF PAWNEE COUNTY

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

MOTION FOR NEW TRIAL—Filed Oct. 29, 1931

Comes now the Board of Equalization of Pawnee County, Oklahoma, the Appellee herein and moves the Court to vacate and set aside the decision of the Court and judgment rendered herein on the 26th day of October, 1931, and to grant a new trial on the following causes which affect materially the substantial rights of said Appellee.

1st. That the decision and judgment is not sustained by sufficient evidence and is contrary to the evidence.

2nd. That the decision and judgment is contrary to law.

3rd. That the decision and judgment is contrary to the law and the evidence.

4th. That the court erred in failing to adjudge that all of the 381 tank cars were taxable by Pawnee County, Oklahoma.

C. E. Mitchell, County Attorney, Pawnee County, Oklahoma; Lewis Raba, Assistant County Attor-
[fol. 72] ney, Pawnee County, Oklahoma, Attorneys for Appellee.

[File endorsement omitted]

[fol. 73] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In re Assessment of Property of JOHNSON OIL REFINING COMPANY

ORDER OVERRULING MOTION FOR NEW TRIAL—Filed Nov. 28, 1931

Now on this 27th day of November, 1931, this matter comes on for hearing on the motion of Pawnee County Equalization Board for a new trial.

The court finds that the motion for a new trial should be overruled.

It is therefore, by the court, ordered, adjudged and decreed that the motion for a new trial filed by the Pawnee County Board of Equalization should be and the same is hereby overruled, to which ruling the Board of Equalization, the County Attorney on behalf of the State of Oklahoma and Pawnee County excepts, and gives notice of its intention to appeal to the Supreme Court of Oklahoma, and the court orders that such notice of appeal shall be entered by the Court Clerk on the proper Docket.

It is further ordered that an extension of time is hereby granted of thirty-seven days to make and serve a case-made [fol. 74] upon the Johnson Oil Refining Company, and said Johnson Oil Refining Company is given ten days thereafter to suggest amendments thereto, the same to be signed and settled within five days thereafter, upon written notice.

Thurman S. Hurst, Judge.

[File endorsement omitted]

[fol. 75] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

STIPULATION AND AGREEMENT OF COUNSEL

It is stipulated and agreed by and between the parties hereto that the foregoing case-made contains a full, true, complete and correct copy of the transcript of the proceedings had before the County Board of Equalization of Pawnee County, Oklahoma, and of the notice of appeal therefrom, and is a full, true, correct and complete copy of the transcript and of the proceedings in the District Court of Pawnee County, Oklahoma, on appeal, including all the evidence submitted, all motions and rulings made, the judgment in said cause, all exceptions allowed, all orders in said cause and all of the record upon which the judgment and journal entry in said cause was made; that

each party waives the right to formal service of said case-made, and the right to suggest amendments thereto, and waives all notice of the time and place for the settlement and signing thereof, and do hereby consent that the same may be settled immediately and without notice.

C. E. Mitchell, County Attorney, Pawnee County, Oklahoma; L. V. Orton, Special Counsel. McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, Attorneys for Johnson Oil Refining Co.

[fol. 76] IN DISTRICT COURT OF PAWNEE COUNTY, OKLAHOMA

No. 8035

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

ORDER SETTLING CASE-MADE

I, the undersigned, Judge of the District Court within and for the County of Pawnee, State of Oklahoma, do hereby certify the foregoing presented to me as a case-made in the action above entitled, and as a full, true, complete and correct copy of the transcript of the proceedings had before the County Board of Equalization of Pawnee County, Oklahoma, and of the notice of appeal therefrom, and a full, true, complete and correct copy and transcript of all the proceedings in the District Court of Pawnee County, Oklahoma, on appeal from said County Board of Equalization, including all the evidence submitted, all rulings made, the judgment in said cause, and all exceptions allowed, all orders in said cause and all the record upon which the judgment and journal entry in said cause was made; that at the time of the presentation of said case-made to me for signing and settlement, there appeared counsel for the respective parties, to-wit, for the State of Oklahoma, C. E. Mitchell, County Attorney of Pawnee County, and L. V. Orton, special counsel, and for Johnson Oil Refining Company, J. A. McCollum and A. A. Davidson, and by and between whom it was agreed that the case-made presented [fol. 77] was a true, full and correct record and transcript of the proceedings in said cause, and of the record upon

which the judgment of the court was made, and agreed that the said case-made might be settled and signed without further notice or proceeding; and, having examined the same, I do now settle and sign the same, as a true, complete and correct case-made in the above entitled cause, and I do hereby direct that it be attested, and filed, by the Court Clerk.

Witness my hand at Pawnee, Pawnee County, Oklahoma, this 12th day of January, 1932.

Thurman S. Hurst, District Judge.

Attest:

Jos. D. Soulsby, Court Clerk, by Ethel Traver, Deputy. (Seal.)

[fol. 78] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 79] IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23219

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

No. 23342

THE BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel., C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, Defendant in Error

STIPULATION FOR CONSOLIDATION—Filed Feb. 11, 1932

It is hereby stipulated and agreed by and between the undersigned, subject to the order of the court, that the foregoing entitled and numbered causes may be consoli-

dated in this court for the purpose of briefing and argument, in as much as each of them involves the same property, to-wit, property of Johnson Oil Refining Company, and presents the question of its taxability, and the right to assess the same for ad valorem taxation by local assessment and taxing officers within the State of Oklahoma.

West, Gibson, Sherman, Davidson & Hull, McCollum & McCollum, Attorneys of Record for Johnson Oil Refining Company. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma. C. K. Templeton, by Leander Hall, Asst. County Attorney of Osage County, Oklahoma. John R. Pearson, of Special Counsel for Osage County, Oklahoma, in Cause #23334. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma.

[File endorsement omitted.]

[fol. 80] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

[Titles omitted]

ORDER OF CONSOLIDATION—Feb. 16, 1932

And now on this day it is ordered by the court that the stipulation of all parties to consolidate the four foregoing causes, be, and the same is hereby approved.

[fol. 81] Minute entry of argument and submission, December 13, 1932, omitted in printing.

[fol. 82] IN SUPREME COURT OF OKLAHOMA

23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

23342

BOARD OF COUNTY COMMISSIONERS OF THE COUNTY OF PAWNEE, OKLAHOMA; The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, Plaintiffs in Error,

vs.

JOHNSON OIL REFINING COMPANY, Defendant in Error

JUDGMENT—Dec. 20, 1932

And now this cause comes on for final decision and determination by the court upon the record and briefs filed therein.

And the court having considered the same finds that the judgment of the trial court in the above cause should be reversed and the cause remanded,

It is therefore ordered and adjudged by the court that the judgment of the trial court in the above cause be, and the same is hereby reversed and the cause remanded with directions to proceed consistent with the opinion filed therein.

Opinion by Riley, J.

[fol. 83] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23219

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Pawnee County, State of Oklahoma

Honorable L. N. Kinerey, Judge

Affirmed

No. 23342

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY

Error from the District Court of Pawnee County, State of Oklahoma

Honorable Thurman S. Hurst, Judge
Reversed and Remanded

No. 23334

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY

Error from the County Court of Osage County, State of Oklahoma

Honorable Henry Wood, Judge

Reversed

Syllabus

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed Waite Clark, P. E. Rowe, R. K. Robertson for Pawnee County.

[fol. 84] C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull for Johnson Oil Refining Company.

[fol. 85] OPINION—Filed Dec. 20, 1932

RILEY, J.:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferret. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in inter-state and intra-state commerce. By the use of them the Johnson Oil Refinery Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special

order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other track- [fol. 86] age at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seems to be the result of sales contracts made from the office at Chicago. O. C. Goward is the Superintendent of transportation for the refinery whose location is Cleveland. The Cleveland office had control and supervision of these acrs (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs, they are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. P. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no ad valorem tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S. 1921, provides:

"All property in this state, whether real or personal, including the property of corporations, banks and bankers except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In [fol. 87] our opinion the taxable situs is there. Travis v.

Dickey, 96 Okla. 256, 222 P. 527; State v. Timbrooks's Est., 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. Gulf Ref. Co. v. Tillinghast, 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. Williamson v. Prairie Cattle Co., 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of the tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage County, and were not subject to taxation elsewhere [fol. 88] than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J.; Hefner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J.; Andrews, J., Abent.

[fol. 89] [File endorsement omitted]

[fol. 90] IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

[fol. 91] PETITION FOR REHEARING—Filed Jan. 14, 1933

Now comes Johnson Oil Refining Company and respectfully petitions the court to grant a rehearing in the above entitled causes, and as grounds therefor the petitioner says:

I

The court has overlooked the controlling effect of a fundamental principle of taxation, applicable to the facts of record, viz., that the right of a state, or municipality, to tax depends upon, and is measured by, its ability to give the protection of its laws to the property taxed, taxation and protection being reciprocal.

Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 194;
Cooley on Taxation, Vol. 1, p. 83;
Webster v. City of Fargo, 82 N. W. 732;
Rolph v. City of Fargo, 76 N. W. 242;
Williams v. Detroit, 2 Mich. 560;
Mobile v. Baldwin, 51 Ala. 61;
Chicago & Northwestern R. R. Co. v. State, 108 N. W. 557;
Cooley's Constitutional Limitations (4th ed.), p. 617.

It is upon this principle that the cars of Johnson Oil Refining Company, engaged in the business of their owner in other states, are taxed there, proportioned to the bene- [fol. 92] fits accorded them while in such states on such business.

American Refrigerator Transit Co. v. Hall, 174 U. S. 70;
Pullman Palace Car Co. v. Pennsylvania, 141 U. S. 18;
Union Refrigerator Transit Co. v. Lynch, 177 U. S. 194;
Gray on "Limitations of the Taxing Power", p. 59;
Keith Ry. Equipment Co. v. Board of Review, 119 N. E. 302.

Upon the foregoing principle:

(a) The admitted use, and the continuous presence, of the major part of the cars, at all times, in other states, and on business which makes such continued use and employment necessary in the free conduct of that business, precludes the possibility of an actual situs for the entire fleet in Pawnee County, or at any one place.

(b) Because of the uncontroverted fact that more than 300 cars of the fleet are continuously absent from the state (not the identical cars, but on an average), engaged in a distinct and separate business from the operation of the refinery, the State of Oklahoma cannot afford the protection of its laws to such cars, the same being subject to the laws of other states in which they are transacting the business of their owner.

[fol. 93] The fleet of cars cannot therefore be taxed as a whole, as was done by the taxing authorities of Pawnee County, on the basis of an actual situs there, because the fleet as a whole was never in Pawnee County or in the state, and therefore such a tax is not only unequal and double taxation, but amounts to a taking of private property without just compensation and to a taking of property without due process of law, and deprives Johnson Oil Refining Company of the equal protection of the law, which constitutional guaranties petitioner has at all times invoked in respect to the taxes assessed against its said property.

Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341;
Chicago, B. & Q. R. Co. v. Chicago, 166 U. S. 226;
Frick v. Pennsylvania, 268 U. S. 473;
Louisville Ferry Co. v. Kentucky, 188 U. S. 385;
Union Transit Co. v. Kentucky, 199 U. S. 194.

II

The conclusion of the court overlooks the uncontradicted and fundamental fact that the main and principal business of Johnson Oil Refining Company is the marketing of refinery products in interstate commerce, and not, as the opinion indicates, the operation of the refinery at Cleve-
[fol. 94] land, the refinery being a distinct entity and but one of the sources of the commodities dealt in and sold

in interstate commerce, which, though taxable as a separate entity because of its location, is an adjunct to the main business in which the company makes its profits.

In arriving at its conclusion the court has overlooked the evidence that the same cars are used also in the transportation of refinery products from other refineries as well as from the refinery at Cleveland, and that they are used in the transportation of the products of the company's lubricating plant at Chicago Heights, as well as transporting gasoline from its bulk stations located in several states (C-m. 23328, p. 19).

It also overlooks the evidence that the cars are an investment in the marketing business, not in the refinery (C-m. 23342, p. 19).

It has also overlooked the testimony that no cars were allotted to the refinery, but were in fact used generally, and without discrimination, in the company's marketing business (C-m. 23334, p. 58).

It has overlooked the testimony that such control as the Cleveland office has over the cars is for routing purposes only (C-m. 23342, p. 34) and that the Cleveland office is a record office only and has nothing to do with the marketing business nor with the control of tank cars. (C-m. 23218, p. 58).

It also has overlooked the fact that taxes were imposed and paid on the cars in seventeen states of the Union, in [fol. 95] all but two of which the tax is upon an ad valorem basis (C-m. 23342, pp. 16, 17; C-m. 23334, pp. 59, 60; C-m. 23334, p. 25).

III

The cars are not an integral part of the refinery, which is a local business, and the functions of which are confined solely to the manufacture of refinery products, wholly independent of the ownership and use of tank cars. The sole function of the cars is transportation, it being immaterial who manufactures or produces the commodity transported. Being owned by a non-resident, they cannot be taxed in Oklahoma. Section 9583, C. O. S. 1921.

IV

The Court has overlooked the very serious consequence of its decision that the entire fleet of cars is taxable in and

by Pawnee County. The cars are the instrumentalities and means by which a foreign marketing business is carried on in states other than Oklahoma. The same instrumentalities are subject to such tax as the respective states in which they enter to transact the busines of their owner may impose, and have in fact imposed, in the exercise of a right recognized by the Supreme Court of the United States. To tax the entire fleet in Oklahoma is to infringe upon the freedom of commerce, being practically a denial of the right of the company to engage in interstate busi-
[fol. 96] ness and to import merchandise, by means of these cars, into other states, and, in effect, denies the right of such other states to exercise the same privilege accorded to the State of Oklahoma, if it sees fit to exercise it.

V

The case of Prairie Cattle Co. v. Williamson, 5 Okl. 488, cited in the opinion, is not, we submit, in point. In that case cattle of the Prairie Cattle Company, evidently a non-resident, were found in Beaver County, Oklahoma, into which they had drifted from another range. The number of such cattle in Beaver County, grazing there in the year 1895, was estimated to be six hundred. The decision that the cattle were taxable in Beaver County rested upon a special statute providing that "whenever any live stock shall be located in this territory for the purpose of grazing it shall be deemed to have acquired an actual situs there for the purposes of this act," and which was an act providing for taxation of personal property "located in any county of this territory after the first day of March of any year, which shall acquire an actual situs therein before the first day of September." The court held that the legislature had authority to give such cattle a taxable situs. We submit, therefore, that the decision is inapplicable to the record in these cases as an authority on the question of actual situs, as distinguished from a legislative situs.
[fol. 97] We submit, therefore, upon the facts, that the tax assessed is beyond the power of the state to impose, and upon property not within its jurisdiction, is an infringement upon the freedom of commerce, places an undue burden upon interstate commerce and violates the Fourteenth Amendment to the Constitution of the United States.

For the foregoing reasons, and in view of the tax assessments on the property amounting to over a million dollars and entailing a heavy burden of taxation, and in view of the important questions involved, and the far reaching effect of the decision, we earnestly request a rehearing and reconsideration of these cases.

Chas. Y. Freeman, McCullum & McCullum, West & Davidson, Attorneys for Johnson Oil Refining Company.

[fol. 98] IN SUPREME COURT OF OKLAHOMA

23218, 23219, 23334, 23342

ORDER DENYING PETITION FOR REHEARING—Jan. 31, 1933

And now on this day it is ordered by the court that the petition for rehearing filed in the above cause be, and the same is hereby, denied.

Swindall, J., dissents.

[fol. 99] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

(Consolidated)

DISSENTING OPINION ON REHEARING—Filed Jan. 31, 1933

SWINDALL, J., dissenting:

An opinion was rendered in these consolidated causes by this court on the 20th day of December, 1932, with which I cannot agree.

The Johnson Oil Refining Company is a corporation organized under the laws of the State of Illinois engaging in the business of refining and selling petroleum products. To facilitate its business it maintains and operates a fleet of approximately 381 railroad oil tank cars. By the use

of them the Johnson Oil Refining Company transports refined products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this state. Sometimes the company purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked "Johnson Oil Refining Company, Cleveland, Oklahoma," and "When empty return to Johnson Oil Refining Company, Cleveland, Oklahoma." The empty cars are, unless diverted by special order as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland [fol. 100] which accommodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. Throughout the year the company has an average of approximately 64 cars per day at Cleveland, Pawnee County, Oklahoma, and an average of approximately 50 cars per day at Osage, Osage County, Oklahoma, where incoming and outgoing cars are held by the railroad company when congestion occurs at the refinery and when economical railroading requires. The remainder of the 381 cars are outside the State of Oklahoma in various other states. The cars move in sixteen states. This company maintains an office in Chicago where its officers having ultimate executive control reside. But, no trackage for cars is maintained in Chicago. Cleveland is the one place where the company always has use for these cars. All of the cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products are the result of sales contracts made from the office in Chicago, Illinois. The superintendent of transportation for the refinery lives in Cleveland and that office has control and supervision over the cars. No tax is paid on these cars in Oklahoma. A capital stock tax is paid in Illinois and they are taxed as personal property in several of the states in which they travel.

Upon these facts the opinion delivered in the causes held, first, that none of the cars were taxable in Osage County, Oklahoma, and, second, that the entire fleet of 381 cars were taxable in the State of Oklahoma in Pawnee County on

the theory that all of them had their situs at that place in this state. It is from this latter proposition that I dissent. The tax sustained by the opinion is clearly a direct tax upon tangible personal property a large proportion of which is constantly outside the State of Oklahoma, although the spe- [fol. 101] cific items of property making up the whole are regularly in and out of the state. It is my opinion that a tax so laid is a violation of the 14th Amendment to the Constitution of the United States, that the State of Oklahoma is taxing property outside its jurisdiction.

Mobilia sequuntur personam was a well established maxim of the common law, and the situs of personal property of every description, wherever it was actually kept or located, was held to be at the domicil of the owner and the property was subject to the jurisdiction of the owner's sovereign. 26 R. C. L. p. 273-4, citing St. Louis v. Wiggins Ferry Co., 11 Wall. 423, 20 U. S. (L. Ed.) 192, and Sangamon, etc., R. Co. v. Morgan County, 14 Ill. 163, 56 Am. Dec. 497. It is said that this doctrine grew up when most personal property was of a nature which was kept close to the person of the owner, was small in amount, and was seldom removed from one jurisdiction to another without the removal also of its owner. In recent times, with the growth of modern industry and transportation, an extraordinarily large body of tangible and intangible personal property has arisen which has its location and ownership entirely independent of the domicil of the owner. In response to this situation the doctrine of location for taxation of personal property has changed.

One of the earlier cases noting the weakness in the fiction mobilia sequuntur personam and pointing to actual situs as the proper place for taxation was Hoyt v. The Commissioners of Taxes, 24 N. Y. 224. In that case the court said:

"It is said, however, that personal estate by a fiction of law has no situs away from the person or residence of the owner, and is always deemed to be present with him at the place of his domicil. The right to tax the relator's property situated in New Orleans and New Jersey rests upon the universal application of this legal fiction; and it is accordingly insisted upon as an absolute rule or principle of law which, to all intents and purposes, transfers the

property from the foreign to the domestic jurisdiction, and thus subjects it to taxation under our laws. Let us observe to what results such a theory will lead us. The nec- [fol. 102] essary consequence is, that goods and chattels actually within this State are not here in any legal sense, or for any legal purpose, if the owner resides abroad. They cannot be taxed here, because they are with the owner who is a citizen or subject of some foreign state.

* * * * * * *

"Accordingly there seems to be no place for the fiction of which we are speaking, in a well adjusted system of taxation. In such a system a fundamental requisite is that it be harmonious. But harmony does not exist unless the taxing power is exerted with reference exclusively either to the situs of the property, or to the residence of the owner. Both rules cannot obtain unless we impute inconsistency to the law, and oppression to the taxing power. Whichever of these rules is the true one, whichever we find to be founded in justice and in the reason of the thing, it necessarily excludes the other; because we ought to suppose, indeed we are bound to assume, that other States and Governments have adopted the same rule."

The law in this country seems to have developed consonant with the thought contained in that opinion. The Supreme Court of the United States has definitely and unequivocally established the principle that tangible personal property is taxable at its actual situs. Delaware, L. & W. R. Co. v. Pennsylvania, 198 U. S. 341, 49 L. Ed. 1077, and cases cited post. See also Prairie Cattle Co. v. Williamson, 5 Okl. 488, 49 Pac. 937. It holds to the view that taxation by a state of such property having a situs outside its boundaries is a violation of the 14th Amendment to the Constitution of the United States. Union Refrigerator Transit Co. v. Kentucky, 199 U. S. 195, 50 L. Ed. 150. On the other hand, in the field of intangible property the law in most cases, depending upon the circumstances, still holds to the doctrine that such property is taxable at the domicil of the owner. In the Union Refrigerator Transit Co. v. Kentucky case, supra, Mr. Justice Brown, delivering the opinion of the court, said:

[fol. 103] "Respecting this, there is an obvious distinction between tangible and intangible property, in the fact that the latter is held secretly; that there is no method by which its existence or ownership can be ascertained in the state of its situs except, perhaps, in the case of mortgages or shares of stock. So if the owner be discovered, there is no way by which he can be reached by process in a state other than that of his domicil, or the collection of the tax otherwise enforced. In this class of cases the tendency of modern authorities is to apply the maxim mobilia sequuntur personam, and to hold that the property may be taxed at the domicil of the owner as the real situs of the debt, and also, more particularly in the case of mortgages, in the state where the property is retained. Such have been the repeated rulings of this court. (Citations:)

"If this occasionally results in double taxation, it much oftener happens that this class of property escapes altogether. In the case of intangible property, the law does not look for absolute equality, but to the much more practical consideration of collecting the tax upon such property, either in the state of the domicil or the situs. * * *"

See 26 R. C. L. p. 282; Notes, 56 Am. Dec. 527, L. R. A. 1915C 914.

The property involved in the case at bar is tangible personalty and would ordinarily fall under the rule which taxes such property at its situs irrespective of the domicil of the owner. However, a prerequisite to the taxation of such property at its situs is that it have a situs, and this property is of a class which in its nature is mobile and may, therefore, move from place to place with such rapidity that it is extremely difficult to assign to it a definite location. While the sovereign has certain jurisdiction over every chattel situated within its territory, not every chattel which happens to be so situated can be regarded as having a taxable situs there. A chattel merely temporarily within the limits is not subject to the ordinary property tax. It must have become identified with the jurisdiction [fol. 104] as a part of its property. See Commonwealth v. Union Pac. R. Co., 214 Ky. 339, 283 S. W. 119, 49 A. L. R. 1091; Kelley v. Rhoads, 188 U. S. 1, 47 L. Ed. 359, 23 Sup. Ct. Rep. 259; Robinson v. Longley, 18 Nev. 71, 1 Pac. 377; Brown v. Houston, 114 U. S. 622, 29 L. Ed. 257, 5 Sup. Ct. Rep. 1091; Coe v. Errol, 116 U. S. 517, 29 L. Ed. 715, 6 Sup.

Ct. Rep. 475; and the cases regarding vessels cited post.

The Supreme Court of the United States has dealt with the problem of jurisdiction to tax this type of property a number of times and a review of some of the decisions sheds much light upon the solution. We are, of course, bound in the present case by its decisions.

In dealing with property of this sort that court has sanctioned the taxation of the fixed value of such property continuously within the state during the taxing period by any method which fairly arrives at that value, although the individual units thereof are constantly changing and are not, as such, identified with the jurisdiction. In Union Tank Line Co. v. Wright (1919) 249 U. S. 275, 63 L. Ed. 602, the court, in considering the proper measure of value for taxation of railway tank cars used in and out of a non-domiciliary state, said:

"A state may not tax property belonging to a foreign corporation which has never come within its borders; to do so under any formula would violate the due process clause of the 14th Amendment. In so far, however, as movables are regularly and habitually used and employed therein, they may be taxed by the state according to their fair value, along with other property subject to its jurisdiction, although devoted to interstate commerce. While the valuation must be just, it need not be limited to mere worth of the articles considered separately, but may include as well 'the tangible value due to what we have called the organic relation of the property in the state to the whole system'. How to appraise them fairly when the tangibles constitute a part of a going concern operating in many states often presents grave difficulties; and absolute ac- [fol. 105] curacy is generally impossible. We have accordingly sustained methods or appraisement producing results approximately correct—for example, the mileage basis in case of a telegraph company (Western U. Teleg. Co. vs. Atty. Gen. (1888) 125 U. S. 530, 31 L. Ed. 790, 8 Sup. Ct. Rep. 961), and the average amount of property habitually brought in and carried out by a car company (American Refrigerator Transit Co. v. Hall (1899) 174 U. S. 70, 43 L. Ed. 899, 19 Sup. Ct. Rep. 599). But if the plan pursued is arbitrary, and the consequent valuation grossly excessive, it must be condemned because of conflict with the commerce clause or the 14th Amendment, or both. Western U.

Teleg. Co. v. Atty. Gen. 125 U. S. 530, 31 L. ed. 790, 8 Sup. Ct. Rep. 961; Marye v. Baltimore & O. R. Co., 127 U. S. 117, 32 L. ed. 94, 8 Sup. Ct. Rep. 1037; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18, 26, 35 L. ed. 613, 617, 3 Inters. Com. Rep. 595, 11 Sup. Ct. Rep. 876; Adams Exp. Co. v. Ohio State Auditor, 165 U. S. 194, 41 L. ed. 683, 17 Sup. Ct. Rep. 305, s. c. 166 U. S. 185, 41 L. ed. 965, 17 Sup. Ct. Rep. 604; American Refrigerator Transit Co. v. Hall, 174 U. S. 70, 43 L. ed. 899, 19 Sup. Ct. Rep. 599; Union Refrigerator Transit Co. v. Lynch, 177 U. S. 149, 44 L. ed. 708, 20 Sup. Ct. Rep. 631; Fargo v. Hart, 193 U. S. 490, 48 L. ed. 761, 24 Sup. Ct. Rep. 498; Cudahy Packing Co. v. Minnesota, 246 U. S. 450, 453, 62 L. ed. 827, 829, 38 Sup. Ct. Rep. 373."

Two of the cases cited above, American Refrigerator Transit Co. v. Hall (1899) and Union Refrigerator Transit Co. v. Lynch (1900), consider specifically the taxation of cars similar to those involved in the present case by a non-domiciliary state. In these cases the facts are essentially the same. In each the owner was engaged in supplying cars to shippers wherever needed; the cars were not confined to any particular route; were run indiscriminately over the lines of railroad over which consignors of freight shipped in such cars choose to route them; had no regular intervals nor any regular number; were engaged solely in interstate commerce; and when in the state were only transiently present. The average number within the state dur- [fol. 106] ing the taxing period in the Lynch case was ten cars per day. That case relied heavily upon the authority of the Hall case in which the court said:

"It having been settled, as we have seen, that where a corporation of one state brings into another, to use and employ, a portion of its movable personal property, it is legitimately for the latter to impose upon such property, thus used and employed, its fair share of the burdens of taxation imposed upon similar property used in like way by its own citizens, we think that such a tax may be properly assessed and collected, in cases like the present, where the specific and individual items of property so used and employed were not continuously the same, but were constantly changing according to the exigencies of the business, and that the tax may be fixed by an appraisement and

valuation of the average amount of the property thus habitually used and employed. Nor would the fact that such cars were employed as vehicles of transportation in the interchange of interstate commerce render their taxation invalid. Marye v. Baltimore & O. R. R. Co., 127 U. S. 123; Pullman's Palace Car Co. v. Pennsylvania, 141 U. S. 18."

The same question was presented in Germania Refining Co. v. Fuller, 245 U. S. 631, 62 L. Ed. 521 (181 Mich. 618) wherein the cars were oil tank cars and the court affirmed the case by memorandum opinion upon the authority of the two cases supra. See also Prairie Cattle Co. v. Williamson, supra, where the Oklahoma Territorial Court sustained a tax on the average theory.

After the decisions in these two cases the question of the power of the domiciliary state to tax the same character of property was presented in the case of Union Refrigerator Transit Co. v. Kentucky (1905) 199 U. S. 195, 50 L. Ed. 150. In that case the cars were employed by the company by renting them to shippers, who took possession of them from time to time at Milwaukee, Wisconsin, and used them for the carriage of freight in the United States, Canada, and [fol. 107] Mexico. The domiciliary state, Kentucky, taxed the entire fleet of 2,000 cars for the years 1897, 1898, 1899, and 1900. During those years the average number of cars used in Kentucky per day was 28, 29, 40, and 67, respectively. The court treated the tax as one upon "tangible personal property permanently located in other states," and held the same invalid on the ground that the domiciliary state had no power to tax such property. The opinion indicated, however, that Kentucky could have taxed the average used within its borders. It said:

"We are of opinion that the cars in question, so far as they were located and employed in other states than Kentucky, were not subject to the taxing power of that commonwealth, and that the judgment of the Court of Appeals must be reversed, and the case remanded to that court for further proceedings not inconsistent with this opinion."

No intimation was made, or needed, with respect to where the excess cars were taxable.

Following this case within less than a year the court again passed upon the power of the domiciliary state in the case of New York C. & H. R. R. Co. v. Miller (1906) 202 U. S. 584, 50 L. Ed. 1155. There the state of New York taxed all of the rolling stock of a railroad company although a considerable proportion of it was constantly outside the limits of the state. The relator contended that the proportion constantly outside should be deducted from the New York tax. No showing was made that any specific items were used continuously and exclusively outside of the state during the whole tax year; the court specifically assumed that none were. The court referred to the cases limiting the power of the domiciliary state to tax, including Union Refrigerator Transit Co. v. Kentucky, supra, then said:

"But it has not been decided, and it could not be decided, that a state may not tax its own corporations for all their property within the state during the tax year, even if every [fol. 108] item of that property should be taken successively into another state for a day, a week, or six months, and then brought back."

Again, in answer to the contention that the present case was but the complement of those cases holding such property taxable in non-domiciliary states, the court said:

"In the present case, however, it does not appear that any specific cars of any average of cars was so continuously in any other state as to be taxable there. The absences relied on were not in the course of travel upon fixed routes, but random excursions of casually chosen cars, determined by the varying orders of particular shippers and the arbitrary convenience of other roads."

A consideration of these cases, together with the history of the law on this subject, elucidates some of the principles governing the decisions. When the industrial revolution increased enormously the body of tangible and intangible personal property the maxim mobilia sequuntur personam was already established and the courts followed it until the necessity of taxing personalty at its actual situs became obvious. They then departed from the maxim in favor of the situs, but for the latter to apply the property must have become identified with a jurisdiction other than that of its owner. There remained a class of property for which no

situs could be definitely defined. A strong feeling has constantly obtained that no thing of value should escape taxation altogether. So, in such cases, the courts have retained the domiciliary theory. This, it seems, should alleviate the necessity of a court seeking out the most definite of several elusive possible situses and oblige it to uphold a tax only when the property has a defined situs within the taxing jurisdiction. Complementary action of other states should equalize the burdens. Property difficult of location has frequently been held taxable in two states. While the courts have not exhibited squeamishness at this situation, they have, nevertheless, tried on the whole to develop a harmonious system. With respect to property similar to that [fol. 109] involved herein Mr. Justice Lurton in Southern P. Co. v. Kentucky, 222 U. S. 63, 56 L. Ed. 96, expressed the feeling of difficulty of taxing at the situs as follows:

"To lay down a principle that vessel property has no situs for purposes of taxation other than that of actual permanent location would introduce elements of uncertainty concerning the situs of such property not presented by other kinds of movable property."

Such a principle would lead to conflicts in taxation between states and disrupt the harmony of the taxing system as a whole. Unfortunate individuals engaged in legitimate trade between states would suffer hardship. Under certain circumstances the courts have applied the theory of fixed value with changing identity. The items of property do not have a situs within the state but the fixed value is always present. In fairness to that state it should be taxable. Yet, it would be a violation of the very principle upon which the theory is set if the state were allowed to tax a greater amount than the value existing within its borders or to tax where no fixed value really exists. It seems that the minimum should be where there is sufficient average continuously used within the state so that it may be said that the average value is identified with the jurisdiction and the maximum should include only that value. Random excursions of cars into a state in insufficient quantity or with insufficient continuity to create a fixed value identified with the jurisdiction should not justify a tax. In harmony with the feeling that all property should be taxed somewhere such property should be taxed at the domicil of the owner. See New York C. & H. R. R. Co. v. Miller, supra.

In the present case I have no doubt that the average value of the property used in this state is taxable herein. On the other hand, it seems clear that under the decisions cited above much of this property was properly taxable in states other than Oklahoma and another part of it probably had no such definite location as to be taxable at its situs at all. If Oklahoma sustains a tax upon all of the property it has violated the interests of harmony in the taxation of such property. The same is true even if we hold that each item of property has an actual situs in this state, though I do [fol. 110] not say that it would not then all be taxable here. But, I do feel that such consideration should make us reluctant to find that situs. Again, with respect to such part as perhaps has no taxable average elsewhere, we should not try to import a situs by any forced conceptions, on the theory that the most definite situs is in this state, but should yield to the domiciliary jurisdiction.

It is my opinion that each unit of the property involved in this case, that is, each tank car, cannot upon analysis be held to have an actual situs in the State of Oklahoma. Each car came into and went out of the state during the taxing period. It stayed at the refinery from 24 hours to 10 days each trip. And there were always a greater number out of the state than in its boundaries, so each car must have remained outside the state considerably longer than it did inside. The fact that the cars were used to transport the products of the refinery at Cleveland, that all other points to which they went were haphazard, that they were returnable when empty to Cleveland, that the company repaired them there and maintained storage tracks for them at that place, and that they were always in demand at Cleveland only, does not seem to me sufficient to establish their situs in toto in Oklahoma. These facts are but evidentiary of the essential factor—that each car is as a whole identified with this jurisdiction. There remains the company's purpose to, and the fact that it did, use these cars widely in interstate commerce, that the cars were in fact employed more out of the state than in it. Purpose coupled with action seems to be the controlling principle in assigning a situs to chattels. See Delaware, L. & W. R. Co. v. Pennsylvania, Kelly v. Rhoads, Robinson v. Longley, Brown v. Houston, and Coe v. Errol, all cited supra.

Some of the cases most closely in point in the present situation are the cases decided in the Supreme Court of the United States concerning the situs for taxation of [fol. 111] vessels. In the case of Hays v. Pacific Mail S. S. Co. (1855) 17 How. 596, 15 L. Ed. 254, California laid a tax upon ocean-going vessels. They were owned by a New York corporation and operated by way of Panama to San Francisco, California, and points in the Territory of Oregon. The ships operated on schedule and were in each port long enough to transact their business there. After discharging at San Francisco they proceeded to Benicia, California, where the company maintained a naval dock and a ship-yard for its ships to put in when not otherwise engaged, for repairs, and to await the commencement of the next voyage, usually ten or twelve days. The court held that these ships had no situs for taxation in California.

In Morgan v. Parham (1873), 16 Wall. 471, 21 L. Ed. 303, the vessel operated on a schedule between Mobile, Ala., and New Orleans, La., touching each port about three days per week. The ship was owned by a resident of New York and was registered in that State. The captain resided in Mobile and a superior agent resided in New Orleans. The ship never went into other waters. The court held the ship, together with others in the same situation, had no situs for taxation in Alabama, and said that such situs was in New York.

In 1905, in Old Dominion S. S. Co. v. Virginia, 198 U. S. 298, 49 L. Ed. 1059, the court held that a ship on navigable waters operating wholly within the state of Virginia but engaged in interstate commerce, had a situs for taxation in that state.

In 1906 it decided Ayer & Lord Tie Co. v. Kentucky, 202 U. S. 409, 50 L. Ed. 1082, wherein vessels and barges operated on inland waters. They were owned in Illinois, had "Paducah, Kentucky" painted on their stern, and when not in use were kept in Paducah. The court held that they had no situs for taxation in Kentucky.

When one compares these cases with the facts in the case at bar it seems to me that we cannot escape the conclusion that each of these cars used into and out of the state of [fol. 112] Oklahoma did not have its taxable situs in this state.

For the foregoing reasons I am of the opinion that the State of Oklahoma has no jurisdiction to tax the entire

number of 381 cars owned by the Johnson Oil Refining Company and that a tax so assessed is a violation of the 14th Amendment of the Constitution of the United States. I, therefore, most respectfully dissent.

[fol. 113] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

CERTIFICATE OF COUNSEL—Filed Feb. 2, 1933

In connection with the motion of Johnson Oil Refining Company to stay mandate in the above entitled causes, I hereby certify that it is the bona fide intention of Johnson Oil Refining Company to prosecute an appeal from the decision and judgment of this Court in the above entitled causes to the Supreme Court of the United States, or to make proper application to said Court for a writ of certiorari, within three months from and after the overruling by this Court of the petition of Johnson Oil Refining Company for rehearing, and which petition was denied by said Court, and that I believe there is merit in said causes, and that the judgment of the Supreme Court of Oklahoma ought to be reversed by the Supreme Court of the United States.

Dated this 2d day of February, 1933.

A. A. Davidson, Counsel for Johnson Oil Refining Company.

[fol. 114] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

APPLICATION FOR STAY OF MANDATE—Filed Feb. 2, 1933

Now comes Johnson Oil Refining Company and moves the Court to enter an order staying and withholding the mandate, or mandates, in the above entitled causes, because

it is the bona fide intention of Johnson Oil Refining Company, within the time provided by law, to appeal from the decision of the Court to the Supreme Court of the United States, or to make application to said Supreme Court of the United States for a writ of certiorari, as movant may be advised as to the proper procedure.

Johnson Oil Refining Company, by Chas. Y. Freeman, McCollum & McCollum, West & Davidson, Its Attorneys.

[fol. 115] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

No. 23218, No. 23219, No. 23342

[Titles omitted]

ORDER STAYING MANDATE—Filed Feb. 4, 1933

Motion of Johnson Oil Refining Company for a stay of the mandate herein came on to be heard *heard*:

On consideration whereof, it is now here ordered by the Court that no mandate of this Court issue in the above entitled and consolidated causes until April 1, 1933, and that if within said time Johnson Oil Refining Company shall have perfected an appeal to the Supreme Court of the United States, or if there is filed with the clerk of this Court a certificate of the clerk of the Supreme Court of the United States that a petition for certiorari and record have been filed in that Court, the stay hereinabove granted shall continue until the final decision of said causes in the Supreme Court of the United States.

Done by order of Conference.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

[fol. 116] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23342

[Title omitted]

PETITION FOR APPEAL—Filed March 16, 1933

Now comes petitioner and appellant, Johnson Oil Refining Company, a corporation organized and existing under

and by virtue of the laws of Oklahoma, and represents that on the 20th day of December, 1932, a judgment was [fol. 117] rendered by the Supreme Court of Oklahoma in the above entitled and numbered causes, as a consolidated cause, in which it avers errors were committed to its prejudice, all of which will more fully appear from the following assignment of errors;

Wherefore petitioner and appellant, considering itself aggrieved by said judgment, prays that it be allowed an appeal therefrom to the Supreme Court of the United States, in order that the errors so complained of may be corrected.

Assignment of Errors

Now comes the appellant above named, and filing herewith its petition for appeal, says that in the record and proceedings, and in the decision in the above entitled cause, manifest error has intervened to the prejudice of your petitioner, and for the purpose of having the same reviewed in the United States Supreme Court, makes the following assignment of errors:

1. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the case of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma is repugnant to the Constitution of the United States, particularly the Fourteenth Amendment thereto.

[fol. 118] 2. The Supreme Court of Oklahoma in its judgment construing the statute of the State of Oklahoma, Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921) under which the cars of the appellant had been held taxable by the State Taxing Authorities, so as to bring within its provisions as to taxability the property in question belonging to the appellant, committed error, in that the statute as so construed by the Supreme Court of Oklahoma deprives the appellant of its property without due process of law in contravention of the provisions of the Fourteenth Amendment of the Constitution of the United States.

3. The Supreme Court of Oklahoma erred in reversing the judgment of the District Court of Pawnee County, Oklahoma, which held that the tax imposed by the taxing officials of Pawnee County, Oklahoma, in appellant's entire fleet of cars was a taking of property without due process of law in contravention of the Fourteenth Amendment to the Constitution of the United States.

4. The Supreme Court of Oklahoma erred in holding that the assessment of a tax by the taxing officials of Pawnee County, Oklahoma, on the entire fleet of cars of appellant, an Illinois corporation having its principal office and place of business in Chicago, Illinois, was within and authorized by the statute of Oklahoma (Sec. 1, Ch. 44, Session Laws 1915, p. 64) providing that all property in the State of Oklahoma, except such as is exempt, shall be subject to taxation, and that said statute as so construed was not in- [fol. 119] valid or repugnant to the Constitution of the United States and the Fourteenth Amendment thereof.

5. The Supreme Court of Oklahoma erred in holding and deciding that the entire fleet of cars had, within the meaning of the statute an actual taxable situs in the State of Oklahoma, notwithstanding that the cars came into Oklahoma for the sole and only purpose of receiving a load of refinery products for transportation out of the state, and were only temporarily in the state for such purpose, and notwithstanding that none of the cars was kept, laid up, or stored in Oklahoma, but, except for short and unavoidable delays, all the cars were continuously in transit in interstate commerce.

6. The Supreme Court of Oklahoma erred in holding and deciding that appellant's entire fleet of cars was taxable in Pawnee County, Oklahoma, notwithstanding the fact that more than 300 cars of the fleet were, during the years for which the tax was imposed, continuously absent from the state (not the identical cars, but on an average), engaged in the marketing business of the appellant in other states, in which states the cars so engaged in business were taxed.

7. The Supreme Court of Oklahoma erred in holding and deciding that the appellant's entire fleet of railroad tank cars, employed and used by it in the transportation of refinery products out of Oklahoma to not less than 17 other

states, for sale there, or in delivery to purchasers in such states, and in which states the cars habitually entering therein for such purposes were taxed, was nevertheless taxable in the State of Oklahoma as an entirety, and that [fol. 120] such tax was not in violation of the Constitution of the United States, and did not contravene the Fourteenth Amendment thereof.

8. The Supreme Court of Oklahoma erred in refusing to hold and decide that appellant's fleet of cars, shown to have been constantly employed, and in movement, in interstate commerce during the years for which they were assessed, did not and could not thereby acquire an actual situs for taxation in the State of Oklahoma.

Prayer for Reversal

By reason whereof, and for which errors petitioner and appellant, Johnson Oil Refining Company, prays that the judgment and decision of the Supreme Court of Oklahoma be reversed and judgment rendered in favor of the said appellant, and for costs.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant, Johnson Oil Refining Company.

[fol. 121] [File endorsement omitted]

IN SUPREME COURT OF THE UNITED STATES

No. 23342

[Title omitted]

ORDER ALLOWING APPEAL—Filed March 16, 1933

The appellant in the above cause having prayed for the allowance of an appeal in the above entitled consolidated cause to the Supreme Court of the United States from the final judgment made and entered therein by the Supreme Court of Oklahoma on the 20th day of December, 1932 (pe-[fol. 122] tition for rehearing having been duly filed and thereafter denied on January 31, 1933), and from each and every part thereof, and having presented and filed its petition for appeal, and its assignment of errors with prayer

for reversal, and upon due consideration thereof and of the record in said consolidated cause:

It is ordered that said petition for appeal be, and is hereby granted, and that an appeal from the judgment of the Supreme Court of Oklahoma in said causes be, and is hereby, allowed, to the Supreme Court of the United States, upon petitioner filing an appeal bond in the sum of one thousand dollars, with sufficient sureties, and conditioned that appellant shall prosecute its said appeal to effect, and answer all costs if it fails to make good its said plea.

It is further ordered that the Clerk of the Supreme Court of Oklahoma shall prepare and certify a transcript of the record, and transmit the same to the Supreme Court of the United States.

The said appellant now presenting a bond in the sum of one thousand dollars, with United States Fidelity and Guaranty Company as surety, it is ordered, that the said bond be, and the same is hereby, approved.

In witness whereof I have set my hand this 16th day of March, 1933.

Fletcher Riley, Chief Justice of the Supreme Court of Oklahoma.

Attest:

Gus Pool, Clerk Sup. Ct., by Reuel Haskell, Jr., Dep.
(Seal.)

[fols. 123-124a] Bond on appeal for $1,000, approved and filed March 16, 1933, omitted in printing.

[fol. 125] [File endorsements omitted]

IN SUPREME COURT OF THE UNITED STATES

[Title omitted]

ACKNOWLEDGMENT OF SERVICE—Filed March 21, 1933

To The State of Oklahoma ex rel. C. E. MITCHELL, County Attorney of Pawnee County, Oklahoma, and The Board of County Commissioners of the County of Pawnee, Oklahoma:

There is hereby served upon you, as appellees, by copies thereof, the petition for appeal by Johnson Oil Refining

[fol. 126] Company, the assignment of errors filed therewith, and the order allowing appeal, in the above entitled cause.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Appellant.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for Appellees.

[fols. 127–170] Citation in usual form showing service on W. T. Cleeton and E. W. Clark filed March 21, 1933, omitted in printing.

[fols. 171–189] IN COUNTY COURT OF OSAGE COUNTY, STATE OF OKLAHOMA

No. 1575

In the Matter of the Proposed Assessment, Upon Information of the Tax Ferret, of Property of JOHNSON OIL REFINING COMPANY

Statement of Evidence.

[fols. 190 & 191] Thereupon G. C. LILLY, of lawful age, being first duly sworn to testify the truth, the whole truth, and nothing but the truth, testifies as follows:

Examination.

Mr. Pearson:

Q. You may state your name.

A. G. C. Lilly.

Q. Where do you reside, Mr. Lilly?

A. 200 Wood ——, Wilmette, Illinois.

Q. What business are you in?

A. I am Secretary-Treasurer of the Johnson Oil Refining Company.

Q. Does the Johnson Oil Refining Company have a refinery at Cleveland, Oklahoma, Pawnee County?

A. They do.

Q. Does it transact any of its business from that place?

A. Manufactures petroleum products at the plant.

Q. Does it have a sales department or a traffic department located there?

A. A local sales department and a traffic department.

[fol. 192] Q. Are you familiar with the manner conducting the yards at the refinery?

A. Yes, in general.

Q. How many cars will that yard there in the refinery accommodate?

A. There are 65 loading spots.

Q. There are 65 loading spots—are there any spots besides the loading track whereby you might store cars until you can pick them up to put on the loading spots?

A. Yes, there is a track, a rip track which accommodates 12 cars in all.

Q. The total capacity of the cars there at Cleveland amounts to around 80 cars, is that right?

A. That's right.

Q. How many cars do the Johnson Oil Refining Company possess at this time?

[fols. 193 & 194] A. At this time we own 385 cars.

Q. Your petroleum—Mr. Davidson stated it took 24 hours to load a car, is that true?

A. That's right.

Q. Or approximately 24 hours—does your output run around 65 cars a day?

A. No, I think that's too high perhaps in the neighborhood of 35 cars or 40 cars a day.

Q. Then, at the best the most cars you can accommodate is 80, is it?

A. Yes.

[fol. 195] Examination.

The Court:

Q. Does the Johnson Oil Refining Company use any tank cars belonging to other concerns to ship their products out?

A. We do, yes.

Q. Do other refineries use your cars to ship out their products?

A. Only when we have purchased material from those refineries and when we send our own cars there to get the [fol. 196] material we buy from them.

The Court: I believe that's all I have.

Mr. Pearson: Let me ask him.

Examination.

Mr. Pearson:

Q. Your men buy for the refinery raw material and market petroleum products?

A. Our main business is marketing petroleum products.

Q. You are not a public service corporation, are you?

A. No.

Examination.

Mr. Davidson:

Q. How long have you been in the marketing business?

A. It was a partnership, four brothers, in June 1909—been in the marketing business since that time.

Q. When was the company organized?

A. When?

Q. Yes.

A. January, 1914.

Q. In Illinois?

A. In Illinois.

Q. And during all that time you have been in the marketing business?

A. Yes.

[fol. 197] Q. You had no refinery until 1922?

A. That's right.

Q. Where do you get your merchandise for marketing?

A. Practically all refineries in the United States here where we can buy advantageously.

Q. Do you still buy merchandise?

A. Yes.

Mr. Pearson: Objected to as incompetent, irrelevant and immaterial, and improper cross examination.

The Court: He has answered. Overruled.

Q. Where is that merchandise shipped, both what you buy and what you manufacture and what you sell?

A. Well, we have about 165 bulk storage distributing stations in Illinois, Indiana, Missouri, Ohio and Wisconsin.

Mr. Pearson: We will admit that those cars are used in inter-state commerce.

Q. That is your own bulk stations?

A. Yes.

Q. Do you also sell gasoline to other stations?

A. Yes sir.

Q. And you serve your own bulk stations?

A. Yes sir.

[fol. 198] Q. Can you tell, Mr. Lilly, what portion of the refined products manufactured at Cleveland are shipped or sold to other states?

A. Well, it is about 99 per cent, plus.

Q. Very small quantity is sold in Oklahoma?

A. Yes sir.

Q. Where is the marketing business of the company conducted?

A. In Chicago.

Q. During all the years mentioned was it conducted there in Chicago?

A. Well, until, prior to 1920 the headquarters was in Chicago Heights.

Q. That is in Illinois, anyway?

A. Yes sir.

Q. Your office then was moved into the City of Chicago?

A. Yes.

Q. Did your company then own tank cars to take care of its marketing business?

A. No, we first bought——

Q. When did you first own tank cars?

A. We bought 20 tank cars in 1918.

Q. And you have increased the number since that time?

[fols. 199–201] A. Yes.

Q. Are these cars always in use?

A. Practically all the time.

Q. All the time, always in movement?

A. Yes sir.

[fols. 202–210] Q. These cars then are used generally for the distribution of production, both purchased by other refineries and manufactured at Cleveland?

A. That's right.

Q. There are no cars set aside or assigned to the Cleveland refinery for that purpose only, are there?

A. No.

[fol. 211] Deposition of witness taken to be used in a matter pending before the County Treasurer of Osage County, to-wit, in the matter of the proposed assessment of omitted property of Johnson Oil Refining Company

In pursuance to the notice hereto attached, and at the time and place therein stated, the County of Osage appeared by C. K. Templeton, the County Attorney of Osage County, and J. A. McCollum and A. A. Davidson appeared on behalf of Johnson Oil Refining Company; and thereupon the said Johnson Oil Refining Company produced the following witnesses in order, to-wit:

O. W. CAMPBELL, of lawful age, who, being first duly sworn, deposeth and saith in reply to the interrogatories propounded, to-wit:

Direct examination.

By Mr. Davidson: It is stipulated and agreed by counsel for the respective parties that the signature of the witness may be waived and the deposition read at the hearing of the above matter with the same effect as if the witness had duly signed the same.

By Mr. Davidson:

Q. State your name Mr. Campbell?

A. O. W. Campbell.

Q. Where do you live?

A. At Denison, Texas.

[fol. 212] Q. Are you connected with the M. K. & T. Railway Company?

A. Yes sir.

Q. As to what capacity?

A. Superintendent Transportation Department, for the entire system.

Q. As such superintendent of such transportation do you have direction of the movement of what is known as tank cars on the system of the Katy?

A. Yes sir.

Q. Are you familiar with the fact that Johnson Oil Refining Company uses tank cars for transportation of tank products over the Katy system?

A. Yes sir.

Q. In shipping the products of the refinery from, say the State of Oklahoma to other states, do bills of lading accompany those various cars?

A. Yes sir.

Q. What direction does the railroad use with reference to returning empty cars?

A. We are obliged to follow instructions as given to the shipper.

Q. Do those instructions generally appear on the bill of lading?

A. Yes, sir.

Q. I assume that there are thousands of those cars on [fol. 213] the Katy Railroad daily?

Mr. Hall: Object to that as immaterial.

By the Court: Overruled.

Mr. Hall: Exception.

A. Yes sir.

Q. In returning empty cars to their destination is it possible at all times to return them without any stop on the journey?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Hall: Exception.

A. It is not possible, no.

Q. Due to what?

A. Due to the general conditions of transportation and traffic conditions.

Q. I assume you make an effort to return them as speedily as possible, do you?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, calling for the conclusion of the witness.

The Court: Overruled.

Mr. Hall: Exception.

A. In view of those conditions, yes sir.

Q. If there are any stops or delays on the road, generally, [fol. 214] would you say whether they are avoidable?

A. In some cases they might be avoidable, in others they are unavoidable.

Q. You don't know, of course, do you Mr. Campbell, where these cars go on their various journeys with gasoline loads, to what states?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, calling for a conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

A. I don't know, with the billing that is offered in individual cases.

Q. If they are shipped to such states as Nebraska, Wisconsin, Minnesota, Ohio, Indiana, Illinois, and Michigan, at what point on your system would cars come back from connection roads to the Katy railroad?

Mr. Hall: Object to that as not the best evidence.

The Court: Overruled.

Mr. Hall: Exception.

A. Ordinarily, Kansas City and St. Louis.

Q. Now where, Mr. Campbell, would these various stoppages be made due to traffic conditions?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, not the best evidence, calling for the conclusion [fol. 215] of the witness.

The Court: Overruled.

John R. Pearson: Exception.

A. Ordinarily at the point where they are received, their immediate terminal or division point.

Q. Has the Katy any yards between St. Louis and Cleveland and between Kansas City and Cleveland, where cars could be sidetracked due to traffic conditions?

A. Yes sir.

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, calling for the conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

Q. Do traffic conditions remain the same from day to day, or are there times when there is a flood of cars in a day?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial.

The Court: Overruled.

Mr. Pearson: Exception.

A. The traffic conditions vary almost daily.

Q. Where is the nearest yard on the Katy Railroad to Cleveland, Oklahoma?

Mr. Hall: Object to that as incompetent, irrelevant and immaterial, not the best evidence.

[fol. 216] The Court: Overruled.

Mr. Hall: Exception.

A. On the North at Osage, Oklahoma.

Q. How large a yard is that?

A. I can't tell you in car capacity, but it is of considerable size, that being a division point.

Q. Now, Mr. Campbell, when is an empty car delivered to Johnson Oil Refining Company?

Mr. Hall: Objected to as calling for a conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

A. When it is delivered it is by our local crews on the tracks of the Johnson Oil and Refining Company.

Q. You mean their own private tracks?

A. Their tracks.

Q. Does the Katy have any yard at Cleveland?

A. They have no yard in the ordinary sense of that term. We have a couple of tracks there which will possibly hold a hundred cars.

Q. Do you know, Mr. Campbell, whether the tank cars from Cushing Refinery are shipped to and returned on your line?

Mr. Hall: Objected to as immaterial.

The Court: Overruled.

[fol. 217] Mr. Pearson: Exception.

Q. Want to show the number of cars.

A. Yes sir.

Q. Now until the delivery of cars to the Johnson Oil Refining Company on its private tracks at Cleveland, who has possession, custody and control of the car?

Mr. Hall: Objected to as immaterial, calling for a conclusion of the witness and not the best evidence.

The Court: Overruled.

Mr. Pearson: Exception.

A. The railroad has possession of them and control in the sense that they are controlling the movement of them up to their destination.

Q. And at whose risk?

Mr. Hall: Objected to that as immaterial.

The Court: Overruled.

Mr. Hall: Exception.

A. At the risk of the railroad in case of damage or destruction of any car.

Q. Now if the private tracks of the Johnson Oil Refining Company are filled with cars, in process of loading—strike that out. Assuming that it takes on an average of twenty-four hours for a car after it reaches private tracks of the Johnson Oil Refining Company, to load and be delivered [fol. 218] back to the tracks of the Katy Railroad Company, and that during their period of twenty-four hours cars are enroute, where would they be held by your Company until such time as the Johnson Oil Refining Company had room for them on their track?

Mr. Hall: Object to that as immaterial, irrelevant and incompetent; not the best evidence, calling for a conclusion.

The Court: Overruled.

Mr. Pearson: Exception.

A. There is no particular point at which they might be held. The movement of the cars after we receive them at the principal junctions where they are received empty is ordinarily marshalled as nearly as they may be to fill the requirement of the shipper for loading.

Q. If that particular point should happen in any instance at the yards at Osage Junction and are delivered at that point temporarily pending their delivery to Johnson Oil Refining Company, does the Katy charge any storage or demurrage?

A. No sir.

Q. The traffic, do you know, can you state, Mr. Campbell, whether these traffic conditions require a stoppage of empty cars on the journey to their destination, does this apply to other roads besides the Katy road?

[fols. 219–330] Mr. Hall: Object to that as immaterial.

The Court: Overruled.

Mr. Pearson: Exception.

A. My experience in my transportation work assures me that they do.

Mr. Davidson: Take the witness.

[fol. 331] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

PRÆCIPE FOR RECORD—Filed March 21, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to prepare and certify a transcript of the record in the above entitled causes, for the use of the Supreme Court of the United States, by including therein the following:

1. Petition in error and case-made attached thereto as Exhibit "A" in Cause No. 23,342.
2. Petition in error and case-made attached thereto as Exhibit "A" in Cause No. 23,334.
3. Motion to consolidate causes.
4. Order of consolidation.
5. Minute of submission.
6. Minute of judgment.
7. Majority opinion of the Supreme Court.
8. Petition for rehearing.
9. Order denying petition for hearing.
10. Dissenting opinion of Justice Swindall on rehearing.

[fol. 332] 11. Motion for stay of mandate and certificate of counsel.

12. Order staying mandate.
13. Petition for appeal.

14. Assignment of errors.

15. Order allowing appeal.

16. Bond on appeal.

17. Service of petition for appeal, assignment of errors and order allowing appeal.

18. Citation and service thereof.

19. Statement in support of jurisdiction under Rule 12 of the Supreme Court of the United States, and service thereof.

20. This præcipe.

21. Certificate of Clerk.

J. A. McCollum, C. C. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 18th day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the Above-named Plaintiffs in Error.

[fols. 333-348] [File endorsement omitted]

IN SUPREME COURT OF OKLAHOMA

[Title omitted]

SUPPLEMENTAL PRÆCIPE FOR RECORD—Filed March 31, 1933

The Clerk of the Supreme Court of Oklahoma is hereby directed to include in the transcript of the record in the above entitled cause, in addition to the matters included in the original præcipe, the following:

Appellee's statement against jurisdiction under paragraph 3, rule 12, of the rules of the Supreme Court of the United States, and service thereof.

This præcipe.

J. A. McCollum, A. A. Davidson, Attorneys for Johnson Oil Refining Company.

Service of the foregoing is hereby acknowledged this 31 day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel, Attorneys for the State of Oklahoma ex rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, and the Board of County Commissioners of the County of Pawnee, Oklahoma.

[fol. 349] Clerk's certificate to foregoing transcript omitted in printing.

[fol. 350] IN SUPREME COURT OF THE UNITED STATES

APPELLANT'S DEFINITE STATEMENT OF THE POINTS UPON WHICH IT RELIES AND DESIGNATION OF PARTS OF RECORD TO BE PRINTED—Filed April 7, 1933

[fol. 351] Statements of Points Relied On

Comes now the appellant in the above entitled cause and states that the points upon which it intends to rely in this Court in this cause are as follows:

Point 1. The statute of the State of Oklahoma, Section 9574 of the Compiled Statutes, 1921, providing:

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation,"

as construed and applied by the Supreme Court of Oklahoma in its judgment and opinion, and so as to bring within its provisions, as to taxability, appellant's fleet of cars, is repugnant to the Constitution of the United States in that it contravenes the Fourteenth Amendment thereto as depriving appellant of its property without due process of law.

Point 2. As, upon the undisputed facts, appellant, an Illinois corporation, was at all times engaged, in the State of its domicile, in the business of marketing refined petroleum products in interstate commerce; that the cars assessed were an investment in, and a facility of such busi-

ness; that they were at all times employed in commerce among the states; that they came to Oklahoma as an incident to such commerce, and were temporarily within the [fol. 352] borders of the state, for the sole purpose of receiving a load of refined petroleum products, principally at appellant's refinery in Pawnee County, Oklahoma, for transportation out of the state, and for delivery in other states, either to appellant's customers, or for sale at its own bulk stations maintained in a number of states; that each car was in the State of Oklahoma for such purpose, on an average, about two days per month; that more than four-fifths of the number of cars, on an average, were continuously out of the State of Oklahoma, employed in their owner's business in other states, and in which states they were taxed, and the taxes thereon were paid; and that as no part of the fleet of cars had ever been laid up or stored, the fleet of cars was not property within the jurisdiction of the State of Oklahoma for taxation purposes, and the assessment of the entire fleet contravened the Fourteenth Amendment to the Constitution of the United States, as claimed by appellant.

Point 3. The domicile of the owner, as an Illinois corporation, furnished, prima facie, the situs of its fleet of cars for the purpose of ad valorem taxation, and the fact that cars of the fleet came habitually to appellant's refinery in Pawnee County, Oklahoma, to be loaded with interstate merchandise for transportation out of the state, and for such purpose only, did not operate to change such situs, or authorize the taxing authorities in Oklahoma to assess a tax thereon, and such tax contravenes the Fourteenth Amendment to the National Constitution.

[fol. 353] Point 4. The continuous movement of appellant's cars, both within and without the jurisdiction of Oklahoma, in interstate commerce, and for the transportation of refinery products from Oklahoma to, and for the distribution thereof in, other states, cannot operate to fix a situs for the entire fleet at the location of appellant's refinery, or at any other place, in the State of Oklahoma.

Point 5. The judgment of the Supreme Court of Oklahoma that the taxable situs of appellant's fleet of cars was at its refinery in Pawnee County, Oklahoma is in conflict with the undisputed facts and the legal effect thereof, and

with the fundamental basis of taxation, and the assessment of a tax thereon deprived appellant of its property without due process of law.

Point 6. The legal situs of the cars at the domicile of appellant, and in other states where they are employed and where they have been taxed, presumably in proportion to the protection afforded them by the laws of such states, precludes, upon established principles of taxation, the right of Oklahoma to levy a tax upon the entire assessable value of the entire fleet, in that the State is not called upon to protect, and cannot, upon the undisputed facts, afford the protection of its laws to, the entire fleet.

Point 7. The Supreme Court of Oklahoma committed reversible error by its reversal of the judgment of the Dis-
[fol. 354] trict Court of Pawnee County, Oklahoma, and in thereby denying the claims of appellant to the rights guaranteed to it by the Fourteenth Amendment to the Constitution of the United States, and which claim of right the said District Court sustained.

Designation of Parts of Record to be Printed

The appellant states that it considers only the following parts of the record necessary for consideration of the points upon which it intends to rely:

Pages 1 to 8, both inclusive.

Beginning with page 22 print to and including line 19 on page 43, ending with "I am Superintendent of the North American Car Corporation", and (continuing the testimony of John Scheidel) beginning on the 3d line of page 44 with the question "Has your company made repairs on these cars?" to and including the 17th line on said page ending with the words "safety appliance repairs", and beginning on the 8th line of page 45 with the question "You stated that you had repaired several of the Johnson Oil Refining Company tank cars," to and including the 19th line of said page 45, ending with the answer "The Traffic Manager at Cleveland, Oklahoma."

Beginning with the 7th line on page 48 at the words "George A. Mindeman, next witness, etc.," and continuing to and including the 6th line of page 49, ending with the words "No, sir", and beginning at the top of page 51 and
[fol. 355] continuing to the bottom of page 52.

Beginning at the top of page 55, to and including page 57.
Beginning at the top of page 58, to and including page 60.
Pages 63 to 66, both inclusive.
Pages 71 to 78, both inclusive.
Pages 79 to 141, both inclusive.

(From Record in Supreme Court No. 23334, Appeal from Osage County)

Beginning at the top of page 190 to and including line 20 with the words "Traffic Department".

Beginning on line 7 of page 192 to and including line 11 of page 193 ending with the word "Yes".

Beginning at line 15 of page 195 with the words "Examination: The Court", to and including line 5 of page 199, ending with the words "Yes sir".

Beginning at line 7 page 202 with the words "These cars then are used, etc." and ending with the 13th line of the same page with the word "No".

Beginning with page 211 and continuing to and including line 6 of page 219.

Beginning on page 331 continuing to and including page 349.

[fol. 356] Respectfully submitted.

Chas. Y. Freeman, J. A. McCollum, Preston C. West, A. A. Davidson, Attorneys for Appellant.

We hereby acknowledge service, by copy, of the foregoing and agree thereto, this 31st day of March, 1933.

W. T. Cleeton, County Attorney of Pawnee County, Oklahoma; Ed Waite Clark, Special Counsel; J. Berry King, Attorney General of Oklahoma, by F. M. Dudley, Assistant Attorney General of Oklahoma, Attorneys for Appellees.

[fol. 357] [File endorsement omitted.]

Endorsed on cover: File No. 37,542. Oklahoma Supreme Court. Term No. 24. Johnson Oil Refining Company, appellant, vs. The State of Oklahoma ex Rel. C. E. Mitchell, County Attorney of Pawnee County, Oklahoma, et al. Filed April 7, 1933. No. 24, O. T., 1933.

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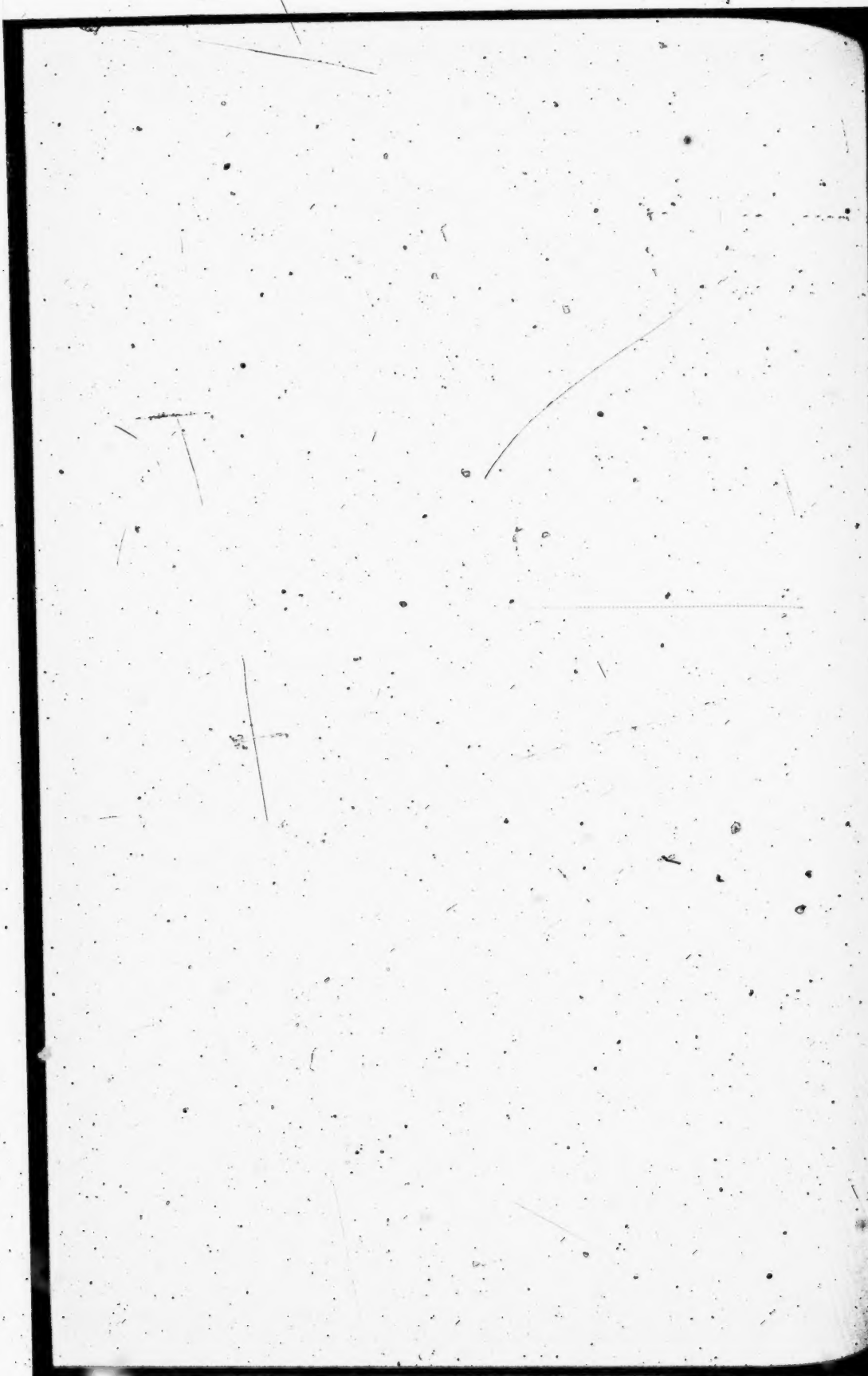

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 845

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT AS TO JURISDICTION.

MAY IT PLEASE THE COURT:

The appellant in support of the jurisdiction of this Court to review the above entitled cause on appeal respectfully represents:

A.

Statutory Provision Sustaining Jurisdiction.

The jurisdiction of this Court on appeal from the Supreme Court of Oklahoma is invoked by reason of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344) having reference to appellate jurisdiction of the decrees of State courts by writ of error:

> "* * * where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

And the Act of January 31, 1928 (Ch. 14, 45 Stat. 54) abolishing the writ of error and providing that all relief which theretofore could be obtained by writ of error shall thereafter be obtainable by appeal, and by the Act of April 26, 1928 (Ch. 440, 45 Stat. 466) with reference to such appeals.

B.

Statute of the State of Oklahoma, the Validity of Which Is Involved.

The statute of Oklahoma, the validity of which as construed by the Supreme Court of Oklahoma, involved in this case is Sec. 1, Ch. 44, Session Laws 1915, p. 64 (Sec. 9574, C. O. S. 1921), which reads as follows:

"All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

C.

Date of the Judgment Sought to be Reviewed and Date Upon Which Application for Appeal Was Presented.

The judgment of the Supreme Court of Oklahoma, which is sought to be reviewed, was entered on December 20, 1932 (R. 82).

A petition for rehearing was duly filed and was denied by said court on January 31, 1933 (R. 98). The application for appeal to the United States Supreme Court was presented to the Supreme Court of Oklahoma on March 16, 1933, and allowed on March 16, 1933 (R. 121).

D.

Nature of Case and Rulings Below.

The above cause, and the judgment therein, involves the validity of an assessment for taxation by the taxing officers of Pawnee County, Oklahoma (amounting to over $756,000) of a fleet of approximately 380 tank cars belonging to appellant, Johnson Oil Refining Company, for the year 1931, as property not listed for taxation for said year.

Appellant is a corporation of the State of Illinois, engaged in the marketing of refined petroleum products and which business is conducted at its domicile. It is admitted that the cars are engaged in interstate and intrastate commerce, and are used by the Johnson

Oil Refining Company to transport its products from its refinery in Pawnee County, Oklahoma, to various points within and without the State in pursuance of its marketing business. It is further admitted that about ninety-nine per cent of the use of the cars was in interstate business; that each car was in the State, on an average, of about two days per month, and that they came into the State for the sole purpose of receiving a load of refinery products. Nevertheless, the entire assessable value of the entire fleet was held taxable by the Supreme Court of Oklahoma under the Oklahoma statute above referred to.

The case originated in a proceeding by the County Board of Equalization of Pawnee County, Oklahoma, in which the entire fleet of cars was assessed by such Board on July 28, 1931, as property omitted from taxation for said year.

(Cause No. 23,334, with which Cause No. 23,342 was consolidated, arose under Article XIII, Chapter 84, Oklahoma Statutes, 1921, under which the same property was assessed by the county treasurer of Osage County, Oklahoma, and affirmed by the County Court of Osage County, on appeal, and from which court an appeal was taken to the Supreme Court of Oklahoma. Both cases were decided by the Supreme Court in the same opinion.)

On appeal by Johnson Oil Refining Company in Cause No. 23,342, from the County Board of Equalization to the District Court of Pawnee County, as provided by Chapter 107, Session Laws 1915, Section 2 (Section 9966 Oklahoma Statutes, 1921), that court

held that the assessment upon the entire fleet of cars was unconstitutional and contravened the Fourteenth Amendment to the Constitution of the United States. The Board of Equalization, in the name of the Board of County Commissioners of Pawnee County, Oklahoma, and the State of Oklahoma ex rel. C. E. Mitchell, county attorney of Pawnee County, Oklahoma, appealed to the Supreme Court of Oklahoma (R. 1).

The Supreme Court of Oklahoma held that the entire fleet of cars was taxable in and by Pawnee County, Oklahoma, for the years specified, and reversed the judgment of the District Court of Pawnee County, Oklahoma (R. 82).

In pursuit of the company's marketing business, the cars habitually entered 17 different States during the course of a year, in which States they were taxed according to value, and the tax thereon was paid (R. 33-34-42). Such tax was, presumably, in accordance with the right of the States to so tax them under appropriate legislation, as repeatedly held by the Supreme Court of the United States.

Eidman v. *Martinez*, 184 U. S. 578;

American Refrigerator Co. v. *Hall*, 174 U. S. 70;

Pullman Palace Car Co. v. *Pennsylvania*, 141 U. S. 18;

Union Refrigerator Co. v. *Lynch*, 177 U. S. 149.

The record further shows that the property of Johnson Oil Refining Company, including its tank cars, is taxed at its domicile in Illinois, upon a valuation of

its entire property which has not paid taxes elsewhere (R. 33).

It is the contention of appellant that the Statute of Oklahoma (Sec. 1, Ch. 44, Session Laws 1915, p. 64; Sec. 9574 C. O. S. 1921) as construed and applied by the Supreme Court of that State is unconstitutional, and that under Section 237 of Judicial Code, amended (U. S. C. A. Title 28, Sec. 344), Act of January 31, 1928 (Ch. 14, 45 Stat. 54) and Act of April 26, 1928 (Ch. 440, 45 Stat. 466) this Court has jurisdiction by appeal.

Said statutes apply not merely in cases where the validity of a State statute in its bare words is drawn into question, but also in cases where the validity of the statute as construed by the highest court of the State is brought into question.

In determining the problem of the right of appeal in such cases the statute as presented to this Court in the record must be read just as though there were included in its language to the effect that the tank cars, such as these involved and used in the instant case should be taxed in full by the State of Oklahoma.

E.

Cases Believed to Sustain Jurisdiction.

The following decisions of this Court are believed to sustain jurisdiction of this appeal:

In *Knights of Pythias* v. *Meyer*, 265 U. S. 30, this Court said with reference to the construction of a Nebraska statute:

> "Under the settled rule of this Court, declared so frequently and uniformly as to have become axiomatic, we must accept this decision of the highest court of the State fixing the meaning of the State legislation as though such meaning had been specifically expressed therein."

In *Appleby* v. *City of New York*, 271 U. S. 364, this Court entertained jurisdiction on writ of error and reversed a judgment of the highest court of the State of New York, which had construed certain statutes of that State in such a manner that they contravened the Constitution of the United States. The statutes in question did not specifically, in so many words, cover the situation, but needed construction. In stating the case Justice Taft pointed out, page 366, that the highest court of New York upheld the statutes of New York and enforced them in such a way as to impair the obligation of the plaintiff's deed in violation of Section 10 of Article One of the Federal Constitution. In his opinion Justice Taft says, page 379:

> "The plaintiffs in their writ of error charge that the judgment of the Supreme Court of New York, as affirmed by the Court of Appeals, has interpreted and enforced the Acts of 1857 and 1871 in such a way as to impair the obligation of the contract in their deeds.
>
> "The questions we have here to determine are, first, was there a contract, second, what was its proper construction and effect, and third, was its obligation impaired by subsequent legislation as enforced by the State court?"

In *Ward & Gow* v. *Krinsky*, 259 U. S. 503, this Court took jurisdiction on writ of error in a case where the New York Court construed a New York statute and upheld it as so construed. This Court said, page 510:

> "In the exercise of our appellate jurisdiction we are bound by the construction of the State law adopted by its court of last resort; * * *. Our function is confined to determining whether, as so construed and as applied to the concrete facts of the case, the statute contravenes the limitations imposed by the Fourteenth Amendment upon State action."

In *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494, the Supreme Court of Illinois upheld the validity of an Illinois statute on the particular construction placed upon it by that court. This Court took jurisdiction on a writ of error. The Court said, page 509:

> "It is true that the interpretation put upon such a tax law of a State by its Supreme Court is binding upon this Court as to its meaning; but it is not true that this Court, in accepting the meaning thus given, may not exercise its independent judgment in determining whether, with the meaning given, its effect would not involve a violation of the Federal Constitution. As said by this Court in *St. Louis Southwestern Railway* v. *Arkansas*, 235 U. S. 350, at page 362, where the question was whether a tax law violated the equal protection clause of the Fourteenth Amendment:

"'Upon the mere question of construction we are of course concluded by the decision of the State court of last resort. But when the question is whether a tax imposed by a State deprives a party of rights secured by the Federal Constitution, the decision is not dependent upon the form in which the taxing scheme is cast, nor upon the characterization of that scheme as adopted by the State court. We must regard the substance, rather than the form and the controlling test is to be found in the operation and effect of the law as applied and enforced by the State.'"

In *Alabama Railway Co.* v. *Jackson Ry. Co.*, 271 U. S. 241, this Court on writ of error reversed a decision of the State court which construed and upheld a statute of the State of Alabama.

In *Southern Ry. Co.* v. *Kentucky*, 274 U. S. 76, this Court entertained jurisdiction on a writ of error of a case in which the Court of Appeals of Kentucky upheld a tax on certain lines of railway under a statute of the State, and reversed the State court's construction and application of the statute.

See also:

Anglo-Chilean Nitrate Sales Corp. v. *Alabama*, — U. S. —, No. 377, October Term, decided February 6, 1933;

Detroit International Bridge Co. v. *Corporation Tax Appeal Board* —, U. S. —, No. 51, October Term, 1932, decided December 5, 1932;

Bryant v. *Zimmerman*, 278 U. S. 63;
Alpha Cement Co. v. *Massachusetts*, 268 U. S. 203.

We therefore respectfully submit that this Court has jurisdiction.

CHAS. Y. FREEMAN,
J. A. McCOLLUM,
PRESTON C. WEST,
A. A. DAVIDSON,
Attorneys for Appellant.

(3234)

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CHARLES ELMORE CROPL
CLERK

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. [redacted] 24

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

J. BERRY KING,
Attorney General of Oklahoma,
F. M. DUDLEY,
W. T. CLEETON,
ED. WAITE CLARK,
Counsel for Appellees.

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SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1932.

No. 845

JOHNSON OIL REFINING COMPANY, APPELLANT,

vs.

THE STATE OF OKLAHOMA EX REL. C. E. MITCHELL, COUNTY ATTORNEY OF PAWNEE COUNTY, OKLAHOMA, ET AL.

APPEAL FROM THE SUPREME COURT OF THE STATE OF OKLAHOMA.

STATEMENT OPPOSING JURISDICTION AND MOTION TO DISMISS.

MAY IT PLEASE THE COURT:

The appellee, in support of its assertion of belief that there exists in the above entitled case no grounds

of jurisdiction for review by this court, and also for grounds of dismissal, respectfully represents:

Jurisdiction of review is sought to be established by appellant, on the grounds of Section 237 of the Judicial Code, as amended (28 U. S. C. A., Sec. 344), quoted under "A" of appellant's statement, as follows:

> "* * * Where is drawn in question the validity of a statute of any State, on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, and the decision is in favor of its validity, may be reviewed by the Supreme Court upon a writ of error."

The Oklahoma Statute asserted (under "B" of appellant's statement) to have been drawn in question on the ground of its being repugnant to the Constitution of the United States, is Section 9574, Compiled Oklahoma Statutes of 1921; which reads as follows:

> "All property in this state, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

Relief under Section 237 of the Judicial Code is sought upon the theory, as set out on page six of appellant's statement, that this Court will accept the interpretation placed upon the Oklahoma statute by the Supreme Court of Oklahoma; and that the Supreme Court of the State of Oklahoma has interpreted Section 9574, C. O. S. 1921, in such a manner as to make it contravene the 14th Amendment of the

Constitution of the United States; thus giving this Court jurisdiction.

Under this doctrine, this Court is asked to "read into the Statute" the interpretation of the Oklahoma Supreme Court:

> Citing: *Knights of Pythias* v. *Meyer*, 265 U. S. 30; *Appleby* v. *New York*, 271 U. S. 364; *Ward & Gow* v. *Krinsky*, 259 U. S. 503; *Hanover Insurance Co.* v. *Harding*, 272 U. S. 494; *Alabama Railway Co.* v. *Kentucky*, 274 U. S. 76, and other cases referred to but not discussed.

Under the cases cited by appellant to the effect that this Court will accept the State court's interpretation of a State statute, it is apparent that this Court will look only to that interpretation, as shown by the decision of the State court.

Inasmuch as this Court will not, for purposes of determining jurisdiction, review the State court's determination as to the *facts* in the case a review of contentions in the State court as to the facts has no place in this statement.

The Supreme Court of Oklahoma, in its decision of December 20, which is set out in full, attached hereto, marked Exhibit "A", after reciting that no *ad valorem* tax was paid on the cars in Illinois, the domicile of the Company, uses the following language:

> "Section 9574, C. O. S. 1921 (C. O. S. 1931, Sec. 12317), provides:
>
> " 'All property in this state, whether real or personal, including the property of corpora-

tions, banks and bankers, except such as is exempt, shall be subject to taxation.'

"A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

"The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that despite the fact it listed for taxation in Pawnee County, 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation owns but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky,* 96 Ok. 256, 222 Pac. 527. *State* v. *Timbrook's Est.,* (La.) 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Okla. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast,* (Mo. App.) 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute 'property within the State'. They are merely temporarily absent at times from Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars is taxable in Pawnee County. *Prairie Cattle Co.* v. *Williamson,* 5 Ok. 488, 49 Pa. 937."

In holding no cars taxable in Osage County, the Court further said:

> "In our opinion these cars did not have a permanent abiding place within Osage County, and were not subject to taxation otherwise than in Pawnee County."

As we conceive it, the above is the interpretation to which this Court will look.

The Supreme Court of Oklahoma interprets Section 9574, C. O. S. 1921, to tax property which has an actual situs, a permanent abiding place, within the State.

In the language of this Court in *Coe* v. *Errol, infra,* in considering the right of a State to subject to taxation all personal property having an actual situs within its borders, "It is hardly necessary to cite authorities on a point so elementary."

> "The right of the State, in which personal property is situated, to tax it, is not affected by the fact that the owner resides in another State, which taxes him for the same property as a part of his general estate attached to his person. *Coe* v. *Errol,* 116 U. S. 517."

To the same effect:

Pullman's Palace Car Co. v. *Pennsylvania,* 141 U. S. 18.

St. Louis v. *Wiggins Ferry Co.,* 11 Wall. 423.

Savings & Loan Soc. v. *Multnomah County,* 169 U. S. 421.

Frick v. *Pennsylvania,* 268 U. S. 473.

The Supreme Court of Oklahoma found the actual situs to be in Pawnee County and the property, for that reason, there taxable in accordance with Sect. 9574, C. O. S. 1921. Surely this Court will not, in considering jurisdiction, go behind that finding of fact on the part of the State Court.

> "As to whether a tax is in accordance with a law of a State, the decision of the highest Court of a State is conclusive." *Pullman's Palace Car Co.* v. *Pennsylvania,* 141 U. S. 23.
>
> "We said in *Champion Lumber Co.* v. *Fisher,* 227 U. S. 445, 451, 33 Sup. Ct. 329, 57 L. Ed. 591, that the validity of a statute of the United States or an authority exercised thereunder is drawn in question when the existence or constitutionality or legality of such statute or authority is denied, and the denial forms the subject of direct inquiry. A dispute of the facts upon which the authority was exercised is not a dispute of its validity. See, also, *Foreman* v. *Meyer,* 227 U. S. 452, 33 Sup. Ct. 331, 57 L. Ed. 594. If there be no dispute about the facts, *Hyatt* v. *People ex rel. Corkran,* 188 U. S. 691, 23 Sup. Ct. 456, 47 L. Ed. 657, might apply. And necessarily the same principle and comment are applicable when there is drawn in question the validity of a statute of or authority exercised under a state." *Ireland* v. *Woods,* 246 U. S. 323.

The appellant's contention of the unconstitutionality of Section 9574, C. O. S. 1921, was not urged upon the Trial Court nor upon the State Supreme Court.

WHEREFORE, for the reasons afore set forth, appellee respectfully moves the court to dismiss this appeal for lack of jurisdiction.

J. BERRY KING,
Attorney General of the State of Oklahoma.
F. M. DUDLEY,
Assistant Attorney General.
W. T. CLEETON,
County Attorney of Pawnee County,
State of Oklahoma.
ED. WAITE CLARK,
Special Counsel.

EXHIBIT "A."

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA.

No. 23,218.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23,219.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Pawnee County, State of Oklahoma.

Honorable L. N. Kimrey, Judge.

Affirmed.

No. 23,342.

In the Matter of the Proposed Assessment and Valuation of Property of JOHNSON OIL REFINING COMPANY.

Error from the District Court of Pawnee County, State of Oklahoma.

Honorable Thurman S. Hurst, Judge.

Reversed and Remanded.

No. 23,334.

In the Matter of the Proposed Assessment of Omitted Property of JOHNSON OIL REFINING COMPANY.

Error from the County Court of Osage County, State of Oklahoma.

Honorable Henry Wood, Judge.

Reversed.

SYLLABUS.

Where tank cars are owned by a refining company incorporated in a foreign state, but authorized to do business in this State, it having but one refinery and that located in this State and such tank cars are used by such company to transport refined products in intrastate and interstate commerce and all of such cars are returnable when empty to the refinery, all such cars are taxable as personal property of such corporation in the county where such refinery is located. None of such cars are taxable in another county merely because some of such cars are temporarily within such other county.

C. E. Mitchell, County Attorney of Pawnee County; Ed. Waite Clark, P. E. Rowe, R. K. Robertson, for Pawnee County.

C. K. Templeton, County Attorney of Osage County; Leander Hall, Frank T. McCoy, John R. Pearson, John T. Craig, for Osage County.

Chas. Y. Freeman, McCollum & McCollum, West, Gibson, Sherman, Davidson & Hull, for Johnson Oil Refining Company.

RILEY, *J.*:

Causes #23,218, and #23,219, originated in the County Treasurer's office of Pawnee County. They were begun by the Tax Ferrett. Appeals were taken to the County Court and tried there by stipulation upon the same evidence. The appeals here are separate. The County Court directed the entry upon the tax rolls of the taxable value of 380 tank cars owned by the Johnson Refining Company for the years 1925-28, inclusive. The taxable situs was found to be at Cleveland, Pawnee County, Oklahoma. From the County Court appeals were perfected to this Court.

Cause #23,342, originated in the Board of Equalization of Pawnee County. The Johnson Refining Company had listed for taxation for the year 1931, tank cars in the number 64. The Board upon notice assessed 381 such cars. The refinery appealed to the district court where a judgment was entered directing the taxation of what was found to be the average number of tank cars (64) situated in the County during the year. From that judgment both the County and the taxpayer have appealed to this Court.

These tank cars are engaged in interstate and intrastate commerce. By the use of them the Johnson Oil Refining Company transports refined petroleum products from its refinery at Cleveland, Pawnee County, Oklahoma, to various points within and without this State. Occasionally the refinery purchases for resale products from other refineries and in that event the cars are shunted elsewhere for that purpose. These cars are marked: "Johnson Oil Refining Company, Cleveland, Oklahoma", or "when empty return to Johnson Oil Refining Company, Cleveland, Oklahoma". The empty cars are, unless diverted by special order, as aforesaid, returned to Cleveland. Repair trackage is maintained at Cleveland. This ac-

commodates from 12 to 15 cars, and at that point alone is located replacements and material for repair of these cars. Other trackage at Cleveland accommodates 65 cars. The refinery loads from 35 to 40 cars per day. The cars upon return remain upon the tracks from 24 hours to 10 days depending on demand. This company is incorporated under the laws of Illinois and maintains an office at Chicago, but no trackage for the cars is there. Cleveland is the one place where the company always has use for these cars. All of these cars are allocated to the refinery at Cleveland, although movements of the cars in the delivery of products seem to be the result of sales contracts made from the office at Chicago. O. C. Goward is the superintendent of transportation for the refinery, whose location is Cleveland. The Cleveland office had control and supervision of these cars (R. p. 34, Cause #23,342). Empty cars are stored at Osage, Osage County, Oklahoma, and Parsons by the railroad company when congestion occurs. They are subject to order and return to Cleveland when needed. The need is communicated to the railroad each day (R. p. 35, Cause #23,342). No tax is paid on these cars in Oklahoma, and no *ad valorem* tax is paid upon them in Illinois (R. p. 4, Cause #23,342).

Section 9574, C. O. S. 1921, provides:

> "All property in this State, whether real or personal, including the property of corporations, banks and bankers, except such as is exempt, shall be subject to taxation."

A lawful tax upon this property is dependent upon whether it has a situs for taxation at the time when and the place where the levy is sought to be made.

The corporation resists the tax in whole, asserting the situs for taxation is not within this State; that

despite the fact it listed for taxation in Pawnee County 64 cars during one of the years, it is not estopped to deny taxation in toto. It asserts that the cars were but temporarily at Cleveland as an incident to its interstate commerce. However, we find that the absence of the cars from Cleveland is but an incident to the conduct of its business. The corporation possesses but one refinery. It is located at Cleveland. In our opinion the taxable situs is there. *Travis* v. *Dicky*, 96 Okla. 256, 222 P. 527; *State* v. *Timbrook's Est.*, 129 S. W. 1068. When this property is away from that point it is in transit, but its destination is always Cleveland, Pawnee County, Oklahoma. So this property has acquired a definite situs which takes it out of the general rule that personal property has its taxable situs at the domicile of the owner. *Gulf Ref. Co.* v. *Tillinghast*, 94 So. 418, 26 R. C. L. 273. Within the terms of the statute these cars constitute "property within this State". They are merely temporarily absent at times from the Cleveland refinery, and then in transit for the delivery of products at various points. The entire number of tank cars are taxable in Pawnee County. *Williamson* v. *Prairie Cattle Co.*, 5 Okla. 497.

The judgments of the County Court are affirmed.

There is no law authorizing a tax based upon an "average number" of cars present on a given day at any one taxable point, and there was no application of that principle by administrative officers.

The judgment of the District Court is erroneous as a matter of law. It is reversed with directions to render judgment directing a listing for taxation of the entire number of tank cars that have their base for operations within Pawnee County for the years involved.

There is another case herewith presented and considered on oral argument. It comes from Osage

County and is styled and numbered, In the Matter of Assessment of Omitted Property of Johnson Oil Refg. Co., #23,334. Therein Osage County is claiming the right to collect taxes upon 50 of the cars already considered. The judgment therein was based upon an "average number theory" and predicated upon the presence of that number of these cars upon the railway siding in possession of the railroad, subject to call from the refinery at Cleveland. In our opinion these cars did not have a permanent abiding place within Osage County and were not subject to taxation elsewhere than in Pawnee County.

The judgment in that cause is reversed with directions to dismiss the action.

Clark, C. J., Herner, Cullison, Swindall, McNeill, Kornegay, JJ., concur.

Lester, C. J., Andrews, J., absent.

This opinion, together with dissenting opinion of Swindall, J., on rehearing, not here attached, not yet officially reported, but reported in 19 Pacific, 2d Series, page 168.